IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 934

WILLIAM A. DOSS,

Petitioner,

vs.

E. E. LINDSLEY, SHERIFF, PIATT COUNTY, ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

WILLIAM A. DOSS,
Martin Bldg.,
Monticello, Ill.

THE GUNTHORP-WARREN PRINTING COMPANY, 2:0 WEST JACKSON, CHICAGO

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, William A. Doss, *pro se*, respectfully prays that a writ of certiorari issue to review a decision of the United States Circuit Court of Appeals for the Seventh Circuit, entered on the tenth day of November, A. D., 1944, affirming the judgment of the District Court of the United States, for the Eastern District of Illinois, denying his petition for writ of habeas corpus against the Sheriff of Piatt County, Illinois and remanding him to the custody of that officer, etc.

I.

SHORT STATEMENT OF THE CASE.

I.

In the State Courts.

The following is as concise a summary as we think can fairly be rendered, of a long and complicated record of facts which were before the Judge of the District Court in the proceedings for habeas corpus, which ended on November 10, 1944 in the Circuit Court of Appeals, for the Seventh Circuit, by an affirmance of a decision of the lower court, denying the petition of this petitioner for writ of habeas corpus.

Petition: The petitioner was charged with contempt of court, as more particularly appears from the amended information filed in the Circuit Court of Piatt County, Illinois, by Special States Attorney, O. D. Mann, on the 13th day of May, 1942, and a copy was attached to the original petition for habeas corpus, marked "Exhibit A", and appears in the transcript of record, pages 7 to 26 inclusive and to avoid repetition for particularity reference thereto is hereby made. Petitioner's motion to strike this information was denied by the Circuit Court of Piatt County and petitioner thereafter filed his verified answer which appears in the transcript, on pages 26 to 59 inclusive.

The charge of contempt was based upon publication and delivery of a certain paper published by petitioner at and from his office in the City of Monticello, Illinois, and delivered to the general public over said Piatt County and to the Grand Jurors, or certain Grand Jurors, then in session or recess in and for the October Term, 1942 of said Circuit Court of Piatt County, while and during, the informa-

tion alleges, the said Grand Jurors were investigating alleged libelous publications previously made in the said Liberty Press against Carl I. Glasgow, States Attorney of Piatt County, and other persons. The information alleged that the said publications were contumaciously, unlawfully and wilfully issued and tended to wrongfully influence the said Grand Jurors and to interfere with them and influence them in the performance of their duties as such, and to impede, obstruct and interfere with and injure the administration of public justice. Copies of the respective publications were attached to the information and made a part thereof by reference. The substance of such published articles is briefly abstracted below:

A.

The Newspaper Articles Claimed to Constitute Contempt of Court.

(a—Issue of November 8, 1941.) This publication consisted of forty-six mimeographed legal size pages and the information refers to pages 1, 39, 40, 41 and 42 of said issue. The petitioner in this publication first stated that he was aware that the Grand Jury was about to meet and that the States Attorney, one Glasgow, was calling such Grand Jury into session for the purpose of indicting the petitioner on a charge or charges, the nature of which was unknown to him. The petitioner had not been arrested or charged with any crime or informed against before any magistrate or committing officer in relation to any matters which rumor indicated might be brought to the attention of the Grand Jury. He had had no intimation that this Grand Jury might be asked to investigate any complaints or charges of criminal libel. Petitioner then gave notice to the States Attorney and to each Grand Juror of his willingness to appear voluntarily before such Grand Jury,

sign immunity waiver and testify on any and all subjects which the States Attorney or the Grand Jurors desired, calling attention in such notice to his constitutional right to publish facts and the truth concerning any person or any subject matter, when done with good motives and for justifiable ends. (Liberty Press, Nov. 8, 1941, Page 39.) The article mentions and reviews several activities on the part of the States Attorney and other lawyers of Piatt County which the petitioner charged would bear investigation, and notifies the Grand Jury that it has the legal right and it is its duty to hear evidence concerning any crime of any person and to initiate investigations, whether the States Attorney so advises or not. The article states that "Now is as good a time as any to start to clean out the Court House", and advises the Christian people of Piatt County to contact the Grand Jurors and ask them to investigate all things in Piatt County. (Liberty Press, Nov. 8, 1941, Page 42.) The article gives the names of the foreman and twenty-two members of the Grand Jury. The article further recites the details of several criminal matters arising in Piatt County with which the States Attorney had been connected, and informs the public of the particular unprofessional, illegal and criminal connections of the States Attorney with those various proceedings.

(b—Issue of November 15, 1941.) This issue consists of forty mimeographed legal size pages. The information specifically refers to items appearing on pages 10, 17, 37, and 38, and that certain statements were made in the said publication which were contemptuous. Such article informed the people of Piatt County that the States Attorney, Glasgow, in the Muse bastardy case, told and instructed a witness that such witness need not testify, and that such witness could refuse to testify on the constitutional ground that he might incriminate himself, and inquired why the States Attorney of Piatt County should do

anything to hinder, conceal or hold back the truth in a criminal case. (Liberty Press, Nov. 15, 1941, Page 10.) The article further reviews the improper activities of the States Attorney in various legal matters in Piatt County, and on page 37, informs the public that the most contemptible thing which "they could do was to try to have Carl Glasgow, States Attorney, get the Grand Jury to indict Judge Doss, (the petitioner)"; and on page 38, the published article continues by stating, "you can now understand why it is important to elect a States Attorney who is really honorable, entirely fair, entirely square to every citizen, with favors to none, and that all shall be treated alike."

(c—Issue of December 23, 1941.) This article informs the public that the States Attorney, Glasgow, as the tool and instrument in the hands of gangism and attorney power in Piatt County, had appeared before the Grand Jury as a witness, and that having so appeared as a witness, could not sign the indictment as the States Attorney, and that in order to "cover up" he was getting some other attorney out of the County, especially appointed as States Attorney for the sole purpose of indicting Judge Doss (the petitioner), but that the Supervisors of Piatt County would not authorize the hiring of a Special States Attorney for that purpose. (Liberty Press, Dec. 23, 1941, Page 1.) The article further states that the publisher knows of no law that he was violating and that it certainly could not be contempt of Court to drop Liberty Press issues throughout the County, as Churchill, over in England, was doing over Germany, (Liberty Press, Dec. 23, 1941, Page 1); the article was not concealed from anybody, but could even reach the hands of the three Circuit Judges of the district and that if the Grand Jurors could have a copy of that issue they could read the full and complete law on the subject as well as any lawyer could tell them.

(Liberty Press, Dec. 23, 1941, Page 2.) The article further informed the public that the publisher had never admitted that he was guilty of either civil or criminal libel because the articles published were the truth and were published for good purposes and justifiable reasons. (Liberty Press, Dec. 23, 1941, Page 5.) The article told the Grand Jury that it was its duty to consider all the law in any matters that they were investigating and that they should read Section 404 of the Illinois Criminal Code; (Liberty Press, Dec. 23, 1941, Page 5) the article then charged that the reason Shonkwiler, Hutson, Hawbaker and others have not sued the publisher for any damages is because, under Section 6, Chapter 126, Illinois Revised Statute, the publisher can prove the truth of the charges made in the publication as a defense. (Liberty Press, Dec. 23, 1941, Page 5.) The article further stated, "No grand juror is bound to accept the interpretation of the law by any States Attorney. They have taken no oath to do that. If the law were otherwise, then a designing, and wicked-minded States Attorney as I charge States Attorney Glasgow is, can cause irreparable damages, and that is contrary to the spirit of our Bill of Rights, and our Constitution and our Statutes of Illinois, and I charge he has given improper instructions as to the law to our present grand jurors and caused them to take positions adverse to me which otherwise they would not have taken and which they now regret." (Liberty Press, Dec. 23, 1941, Page 6.) The article further states, "that the Grand Jurors, not being lawyers, naturally do not know what may be, or may not be, the legal position of an indictment in their hands not yet actually filed and returned to the honorable court—but if they will inquire of any of the three honorable Circuit Judges of this district, they will be advised that so long as an indictment is still in their hands and has not actually been filed in court the Grand Jury can reconsider the

same upon their own motion and withdraw it if they should so decide", (Liberty Press, Dec. 23, 1941, Page 8) and further that "The Grand Jury can require and should require no legal advisor to them to be in their room when they vote an indictment or other matters. (Liberty Press, Dec. 23, 1941, Page 8.) The article continues with a statement, "Nothing that I have said herein is intended as charging any disrespect of any kind to the honorable Circuit Court of Piatt County, nor any of its Judges, no matter what Judge or Judges have presided over any of the matters to date, and the only comment that I would make is, that I think the Judges have done a pretty good job in handling a terrible legal mess that they have been obliged to face and try to manage in the best way that they can with due regard and fairness to the best interest of the parties concerned." (Liberty Press, Dec. 23, 1941, Page 8).

d—Issue of December 26, 1941.) This article is similar in tone and substance to the previous article, but concludes by stating, "I have published this article to show that really what is causing the world war today is because the world does not recognize and is not willing to live by the principles set forth in our Federal Bill of Rights! This is a vital matter and it is singular that this attorney gang issue could come up in the way that it has, and now presents an issue before our honorable Grand Jury of this County, so it will construe and give life and effect—or death, to not only our Federal Bill of Rights, but our State of Illinois Constitution and our own Statute on the freedom of speech and freedom of publication as applied to Piatt County." (Liberty Press, Dec. 26, 1941, Page 10.)

(e—Issue of January 10, 1942.) The article recites that the Circuit Clerk has sent out a notice to the Grand Jury to return on the 15th, which is the last day of the October Term of Court and that the writer is accordingly much

disappointed that they have not been called sooner and because the foreman, Ed. Kanitz, has not called the Grand Jury sooner himself since the publisher had placed several matters in his hands which he cannot possibly dispose of on January 15th, and it looks like those matters are not going to be investigated and that is not as it should be. (Liberty Press, Jan. 10, 1942, Pages 33-34.) The article continues by stating that if there were matters that certain attorneys wanted investigated, they could through the States Attorney, have the Grand Jury back here every day, but now that those attorneys have found out that their scheme is about to touch hot irons, to their own skins, they do not want the Grand Jury to come back, and the publisher further states, "I believe that when the people of Piatt County fully understand this,—another dirty trick of these attorneys,—that they will demand that something be done about these things, and while this Grand Jury, under the guidance of Ed. Kanitz, as foreman, may not go into these things, maybe the next Grand Jury will," (Liberty Press, Jan. 10, 1942, Page 34) and the writer expresses the hope that the court of public opinion, the people, will demand a full, fair, frank and honest investigation of all matters and that they are welcome to investigate every charge the writer has made in the Liberty Press, from even the first issue and that the writer will prove his charges and prove his justification. (Liberty Press, Jan. 10, 1942, Page 34.)

(Conclusion of Information.)

The information concluded that the matters so published in the Liberty Press were all calculated to prevent, frustrate, influence and interfere with the progress, operation and conduct of the investigation before the Grand Jury and to intimidate and influence it in the performance of its duties and such as to bring the authority and dignity of

the court into disrepute and to impair the reputation of the court, to thwart and hinder the due administration of justice by the court, and that each of the statements aforesaid were willful, wrongful, unlawful, malicious and contemptuous of the court; the information then continued with a prayer that a citation issue out of said court requiring the respondent to appear before said court in a short day to be fixed, to show cause, if any, why he should not be punished for contempt of court.

To the information as above summarized the petitioner filed answer in the Circuit Court of Piatt County, alleging that no act alleged to constitute contempt of court had occurred in the presence of the court; that insufficient facts are stated to constitute a contempt or indicate interference with lawful proceedings before the grand jury; that the information does not deny the truth of the statements or the facts published in the Liberty Press and quoted in the information, and that the information is general, vague and lacking in specific statements of fact; that the information charges petitioner with informing the Grand Jury that certain situations should be investigated, which is not violative of any law of the State of Illinois, nor contempt of court, nor does it indicate the likelihood that substantive or serious evil will result from the publication of such statements, or that it tended in any way to interfere with the administration of justice.

Petitioner further answered that the paragraphs from Liberty Press quoted in the information upon their face negative any possibility of interference with the administration of justice and that the suppression of the right to make such statements was likely to result in serious or substantive evil.

Petitioner further stated that the information showed upon its face that it was inspired by malice and not from a desire to protect public justice.

Petitioner admitted the publications of the articles and the portions quoted in the information, but denies that they were contumacious, intended to interfere with the administration of justice, or that the publications thereof unlawfully tended to create, or unlawfully gave rise to substantive evil of any kind. Petitioner claims that the publications were lawfully warranted and were lawful self-defense actions, and cites among other matters, some of the circumstances as disclosed in this record in the affidavits of two of those Grand Jurors, namely, first, one James Busick, in which affidavit at transcript page 51, he deposed: "Affiant further states that he heard said Special States Attorney Mann state before the said grand jurors, and before a true bill was voted against William A. Doss in either of the four above described indictments, to the effect that 'if you (meaning the said Grand Jurors) do not vote indictments (meaning some one or all of these indictments above mentioned) against Judge Doss (meaning William A. Doss), you (meaning said Grand Jury) cannot be considered as good American citizens, you wouldn't be fit to be considered as citizens of the United States', and, in addition thereto, said in substance, further that 'it is your duty (meaning the duty of the grand jury) to support and stand by your States Attorney (meaning Carl I. Glasgow) in what he wants done in these matters (meaning finding said indictments):'" and Busick further deposed, (transcript 47, 48)—"That at various times and on various occasions while these Liberty Press articles were before said Grand Jury, said Carl I. Glasgow stated in substance, that 'Judge Doss, (meaning William A. Doss), should be indicted for the articles published in the Liberty Press issues, some of those issues of which were in evidence before said Grand Jury', and said Glasgow further stated, on one occasion, that if this Grand Jury did not indict Judge Doss, (meaning William A. Doss), that the

next Grand Jury would, or we will continue until they do' ''; the second Grand Juror, one Paul Silver, deposed to the same effect upon the statements made by Special States Attorney Mann, (transcript 58), and by States Attorney, Carl I. Glasgow, (transcript 55).

These actions by these prosecuting officers, were in violation of the Law of the State of Illinois and violated the Constitutional rights of this petitioner in not being accorded due process of law in these official Grand Jury investigations,—the Supreme Court of Illinois in the case of *Gitchel* v. *People*, 146 Ill. 175, in noting the duties of a States Attorney said: "He may be present, (with the Grand Jury), to give advice, to question the witnesses, to draw such Bills as the Jurors are prepared to find and to give such general instructions as to the law as occasion may require, but he must not attempt to influence or direct the actions of the Grand Jury in respect to their findings: nor be present when they are deliberating on the evidence or when their vote is taken"; again, the Supreme Court said, in *People* v. *Gerold*, 265 Ill. 448, "Such an officer, (States Attorney) is acting in a quasi judicial capacity, (before the Grand Jury) representing such Jury, and should stand indifferent as between the accused and any private interest."

Petitioner denied that the publication was wilful or malicious in any degree but alleged that the statements of facts therein contained were true and were made from good motives and for justifiable ends.

Petitioner answered further that the matters published and referred to in the information were not intended to bring justice into contempt, to interfere with the administration thereof, or to reflect upon the Court or the Grand Jury, and so specifically stated in the publications.

The information for contempt was heard only upon the

said amended information and the answer of this petitioner thereto. No witnesses were heard; and the case was heard by the Court without a jury. The trial judge, on the 22nd day of May, 1942, in the Circuit Court of Piatt County, held the answer insufficient to purge petitioner of contempt, and entered sentence of three months in the County Jail of said County and a fine of $2,000.00 and costs, and to stand committed until the same was paid, and the sentence not to run concurrently with any other sentence or judgment.

From the said judgment of the Circuit Court of Piatt County, Illinois, petitioner appealed to the Supreme Court of Illinois, where said judgment was affirmed; that thereafter petitioner applied for a writ of certiorari to the United States Supreme Court, but which was denied, and upon the following order:

> "Petition for writ of certiorari to the Supreme Court of Illinois denied for the reason that application therefore was not made within the time provided by law. Section 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U. S. C., Section 350. Entered October 11, 1943."

Thereafter, petitioner filed his said petition first hereinabove described for habeas corpus in the United States District Court for the Eastern District of Illinois, on December 1, 1943, and the grounds therefore are specifically set forth in the transcript of record filed in this cause on pages 3 to 7 inclusive, and upon the grounds as follows:

(1) That the amended information for contempt involved matters and charges totally and exclusively arising upon facts all beyond the presence of the court, and involved none committed in its presence, and are charged to be criminal in nature. In proceedings under the Illinois Law, charging a contempt for acts committed out of the presence of the Court, no evidence is heard and the re-

spondent by his mere affidavit may purge himself of the charged contempt. If the affidavits are false, he may be prosecuted for perjury. If the affidavits are true, and set up a lawful defense, the Court is in duty bound to discharge the defendant. The answer details a reply factually to each and every charge and allegation to the amended information, and as to all of which now the petitioner says are true and that the statements made by petitioner in his answer are protected and guaranteed to him by the rights of freedom of speech and press under the Constitution of the United States and that such answer is a complete purge to the amended information.

(2) That the amended information discloses upon its face that it is an attempt to abridge and limit the rights guaranteed to petitioner by the Federal Constitution and its Amendments, namely, the right to the exercise of the freedom of speech and freedom of the press.

(3) The judgment and sentence of three months in jail and a fine of two thousand dollars,—the sentence not to run concurrently with any other sentence,—are alleged to be violative of Amendment VIII to the United States Constitution, in that the fine is excessive, and the three month's jail sentence not to run concurrently with any other sentence, is cruel and an unusual punishment, and is indefinite and uncertain.

The Supreme Court of Illinois affirmed the judgment and sentence of the lower Court on January 15, 1943, and on March 11th following, struck defendant's petition for rehearing. On June 11, 1943, this petitioner filed in the Supreme Court of the United States, his petition for certiorari to be directed to the Supreme Court of the State of Illinois, which petition was by this Court denied in an order entered October 11, 1943, as above quoted. Petition for rehearing was denied by the Supreme Court of the United States on November 15, 1943. The petition for cer-

tiorari above referred to, was filed to review the judgment of the Supreme Court of the State of Illinois affirming the judgment of contempt against this petitioner, entered in the Circuit Court of Piatt County, wherefore it appeared to this petitioner that he had exhausted all of his remedies under the laws of the State of Illinois and was without a remedy, except by petition for habeas corpus to the District Court of the United States for the Eastern District of Illinois.

II.

In the United States Courts.

Petition: The matters of facts set forth and summarized in the preceding paragraphs of this petition, stating the contents of the information, the answer thereto and the proceedings in the Circuit Court of Piatt County, Illinois and the Supreme Court of the State of Illinois, were set forth in the petition for habeas corpus filed in the District Court of the United States for the Eastern District of Illinois, as heretofore mentioned and no further restatement of these facts is deemed to be necessary.

Answer: To the petition for habeas corpus, the respondent, E. E. Lindsley, Sheriff of Piatt County, filed his verified answer on December 8, 1943, which appears in the transcript of record at pages 64 to 71 inclusive, and in substance, generally denies that the petitioner is held in violation of the Constitution of the United States, and further says, "that the Petition shows upon its face that the petitioner has been denied a writ of certiorari by the Supreme Court of the United States to review the decision of the Circuit Court of Piatt County, Illinois, and the Supreme Court of the State of Illinois, and that petitioner therefore, is not entitled to a writ of habeas corpus in this Court."

Subsequent Proceedings: Upon the petition and answer, the case was heard by Hon. Walter C. Lindley of the United States District Court on January 4, 1944; on January 8th, Judge Lindley denied the petition for habeas corpus, his opinion and judgment appearing on pages 74 to 85 inclusive of the transcript of the record. On February 1st, following, an appeal was perfected by this petitioner to the Circuit Court of Appeals, for the Seventh Circuit, (see transcript pages 87-88; 89-90; 91-92; 92-94; 97-98), which the Court, on November 10, 1944, affirmed the decision of the District Court, without opinion.

The petitioner relied in the Circuit Court of Appeals upon an Assignment of Errors, substantially as follows:

(1) That the United States District Court for the Eastern District of Illinois, erred in dismissing the petition of the plaintiff;

(2) That the Court erred in holding that the plaintiff had not exhausted his remedies in the State Courts of the State of Illinois;

(3) That the Court erred in holding that the plaintiff was not in custody as required by the laws of the United States;

(4) That the said Court erred in holding that upon the merits of said cause, plaintiff was not entitled to be released and discharged on writ of habeas corpus;

(5) Said decree and judgment are contrary to the law and deny to the plaintiff protection afforded him by the Constitution of the United States.

On March 21, 1944, attorneys for petitioner, (Appellant), A. M. Fitzgerald and Walter T. Day, and Oliver D. Mann, attorney for respondent, E. E. Lindsley, Sheriff aforesaid, entered into a stipulation to "omit certain exhibits from the printed transcript of the record and to supply type-

written or printed copies in lieu thereof", as appears on pages 97 and 98 of said transcript of the record.

On petition of this petitioner, the Circuit Court of Appeals for the Seventh District, recalled its mandate to the District Court for the purpose of enabling this petitioner to take the necessary steps to petition the Supreme Court of the United States for a writ of certiorari, directed to the Circuit Court of Appeals for the Seventh Circuit in this case, all of which appears in the transcript of the record, pages 128 to 135 inclusive; the Court stayed a reissuance of the mandate to and including January 26, 1945, in order to give petitioner time to prepare and file his petition for certiorari in the Supreme Court of the United States. On January 23, 1945, on motion of this petitioner, the issuance of the mandate was further stayed to and including February 10, 1945, to enable petitioner to prepare and file his petition for certiorari.

III.

Statement of Matters Involved and the Reasons Relied Upon for the Allowance of the Writ.

The discretionary powers of this Court to grant a writ of certiorari is invoked on the following grounds:

First. The instant proceeding is a cause wherein final judgment rendered by the Supreme Court of the State of Illinois, being the highest Court of that State in which a decision could be had, draws in question the validity of a Statute of the State of Illinois on the ground that it is repugnant to the Constitution and laws of the United States.

Second. The instant proceeding is a cause wherein also the final judgment rendered by the United States District Court for the Eastern District of Illinois and a final judg-

ment by the United States Circuit Court of Appeals for the Seventh Circuit draw in question also the validity of that Statute of the State of Illinois on the ground that it is repugnant to the Constitution and laws of the United States.

Third. The instant proceeding involves a trial right, privilege and immunity specifically set up and claimed by the petitioner under the Constitution of the United States and the Federal Bill of Rights.

Fourth. The decision of the Supreme Court of the State of Illinois abridges the right of free speech and freedom of the press as defined and granted by the Constitution of the United States, Amendment I, (Bill of Rights), and by the Constitution of the State of Illinois, Article II, Section 4.

Fifth. The decisions of the Courts above referred to, show an inability to reconcile the right of free speech and free press, as protected by the Constitutions of the United States and of the State of Illinois, with the historical power of the Courts to protect their own dignity and to prevent interference with the due administration of justice. As a result of this failure to ~~recognize the~~ reconcile these fundamental concepts of the law, this petitioner has been deprived of certain fundamental constitutional rights and privileges.

Sixth. The information on which petitioner was convicted in the trial court, was based on alleged facts and occurrences, all of which originated beyond the presence of the Court; no testimony was introduced and the only evidence before the trial Court was an affidavit by this petitioner, respondent, in the trial Court. Under the State procedure, if the statements in the affidavit were untrue, the affiant became subject to prosecution for perjury, and if the affidavit be found to be true, the trial Court was bound to hold the respondent, petitioner here, purged of

the contempt charge. Inasmuch as the State did not introduce affirmative proof against, or otherwise challenge the truth of the facts set forth in the affidavit, it was the legal duty of the Court to take the statements therein as true and hold this petitioner purged of the contempt charge. This, the Circuit Court of Piatt County, Illinois, did not do, and the affirmance of the conviction by the Supreme Court of the State of Illinois therefore denied to the petitioner, due process of law to which he was entitled in the State of Illinois. The holding of the Supreme Court of the State of Illinois renders nugatory the provisions of the Bill of Rights of the Federal Constitution, (Amendment I), and the XIV Amendment, Section 1, and the Constitution of the State of Illinois, Article II, Section 4, guaranteeing to the petitioner, the right of freedom of speech and of the press, and is in conflict with the decisions in the following cases:

Harry Bridges v. *State of California* (1941), 314 U. S. 252, 86 L. Ed. 192.

Largent v. *State of Texas* (1943), 318 U. S. 418, 63 S. Ct. 667, 669.

Jamison v. *State of Texas* (1943), 318 U. S. 413, 63 S. Ct. 669, 671, 672.

In the Texas cases cited above, the general power which a city concededly has over its own streets, was invoked in such a way as to destroy the fundamental rights of defendant "to express his views in an ordinary fashion", just as in the instant case, the general and historic powers of the Court to protect its own dignity and enforce the ordinary administration of justice, is invoked in an attempt to imprison this petitioner for the exercise, in an ordinary fashion of the Constitutional right of free speech and free press. There is no evidence in the record and the excerpts contained in the information as a basis of the

charge against this petititoner are wholly inadequate as justification of the suppression of free speech and free press and no reasonable grounds to fear that serious evil will result if freedom of the press be practiced, as it was by petitioner, nor, is there any reasonable ground to believe that the danger was imminent that any serious or substantive evil would result unless such suppression occurred. Such was the holding in the case of Bridges against the State of California, *supra.*

Seventh. The statements and excerpts from the Liberty Press published by this petitioner, which were made the basis of the prosecution upon which the State below rested its case, were indubitably made in forceful and unequivocal ~~vocable~~ language. The Constitutional guarantee of free speech and free expression, however, does not compel insipidity in presenting the truth. ~~Thus,~~ This petitioner is wholly unable to improve upon the language of Judge Cooley on this subject when he said:

> "The beneficial ends to be subserved by public discussion would in large measure be defeated if dishonesty must be handled with delicacy and fraud spoken of with such circumspection and careful and deferential choice of words as to make it appear in the discussion a matter of indefference. * * * Who would venture to expose a swindler or a blackmailer, or to give in detail the facts of a bank failure or other corporate defalcation, if every word and sentence must be uttered with judicial calmness and impartiality as between the swindler and his victims, and every fact and every inference be justified by unquestionable legal evidence? The undoubted truth is that honesty reaps the chief advantages of free discussion; and fortunately it is honesty also that is least liable to suffer serious injury when the discussion incidentally affects it unjustly. * * * The law, justly interpreted, is not chargeable with the inconsistency of tempting conductors of the press with a deceptive pretence of lib-

erty and then punishing them in damages if they act upon the assumption that the liberty is genuine."

Atkinson v. *Detroit Free Press Co.*, 46 Mich. 341, 382, 383, 384.

Eighth. The provisions of the XIV Amendment to the Constitution of the United States respecting due process and prohibiting the States from interferring therewith, are not mere guides to the formation of policy, but are commands, the breech of which is not to be tolerated by the Courts, as pointed out in the case of *Bridges* v. *State of California*, *supra*.

Ninth. The specific purpose in ratifying the Bill of Rights was to make clear the securing for the People of the United States greater freedom of religion, expression, etc., which includes freedom of the press as an inalienable right.

Tenth. Petitioner has exhausted all of his remedies for relief under the Laws of the State of Illinois.

Conclusion.

Wherefore, your petitioner prays that the writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding the said Court to certify and send to this Court, a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in case No. 8542, entitled, "William A. Doss, Plaintiff-Appellant, *vs.* E. E. Lindsley, Sheriff of Piatt County, Illinois, Defendant-Appellee, Appeal from the District Court of the United States for the Eastern District of Illinois," to the end that the decision and judgment of the said Circuit Court of Appeals for the Seventh Circuit may be reviewed and determined by this Court as provided

by the laws of the United States; and that the judgment herein of the said Circuit Court of Appeals be reviewed and reversed by this Court and for such other relief as this Court may deem just and proper.

WILLIAM A. DOSS,
Petitioner,
Pro Se.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of Court Below.

The judgment of the United States Circuit Court of Appeals for the Seventh Circuit affirmed the decision of the United States District Court for the Eastern District of Illinois, without formal opinion.

The opinion of the United States District Court for the Eastern District of Illinois was entered by the Honorable Walter C. Lindley and appears in the transcript of record, pages 74 to 85 inclusive; the affirmance of that opinion by the United States Circuit Court of Appeals appears at page 103 of the transcript of record.

II.

Jurisdiction.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925.

Date of Judgment.

The judgment in the United States Circuit Court of Appeals was rendered November 10, 1944. No formal petition for rehearing was filed but a motion to recall the mandate was made and denied.

III.

Statement of Case.

A statement of the pleadings and formal procedures has been made in the petition for the writ of certiorari, such matters accordingly are not being here repeated. The pleadings, however, do disclose the factual situation giving rise to the present amended information, conviction and judgment in the Circuit Court of Piatt County, Illionis, originally, and of the appeal of that judgment to the Supreme Court of the State of Illinois, and later the petition for habeas corpus by the petitioner to the United States District Court for the Eastern District of Illinois, and its denial of that petition; the appeal from that decision by the petitioner to the United States Circuit Court of Appeals and of its affirmance of that judgment and without opinion, and now is being presented this petition for certiorari to the United States Supreme Court.

Petitioner, it appears from these records, has been at odds with other practicing attorneys at the bar of his county of Piatt, Illinois, for several years, and as one method of upholding, or attempting to uphold, his rights then as a former practicing lawyer and informing the public concerning the various activities of the various prosecutions against him, etc., he commenced, on February 12, 1941, the publication of a paper or pamphlet he designated as the Liberty Press. This publication appeared as occasions seemed to demand, and, on the average, amounted to approximately four thousand copies of each issue. It was distributed by common newspaper carrier boys who deposited them upon the porches of the homes of the various citizens of Piatt County, Illinois, and were variously mailed to citizens of rural parts of said Piatt County by a staff of High School girls who worked from mailing lists

which included practically all prominent citizens of the county, public officials, supervisors, judges, clerks, highway commissioners, precinct committeemen, and persons of influence in the county generally. Suffice it to say that the publisher in every publication felt at liberty and duty-bound to speak his mind freely, and, whenever necessary or expedient, he gave detailed facts, figures, dates, records and the names of witnesses, disclosing improper conduct, unfair dealings, untruthful statements, coercion, intimidation and unethical practice on the part of certain attorney members of the bar of that county, including State's Attorney Carl I. Glasgow.

Petitioner in several publications published that State's Attorney Carl I. Glasgow was not a fair and impartial prosecutor, giving in each instance, however, illustrations in fair detail justifying such accusations. In various issues of his Liberty Press the petitioner openly and repeatedly invited civil suit for damages at the hands of State's Attorney Glasgow or any other person who considered himself lawfully damaged by such publications and specifically stated, if and when such damage suit should be instituted by any aggrieved person, he, the petitioner, would prove the truth of the charges so made in his publications and that the same were published for justifiable ends.

No civil suit for damages has ever been instituted against the petitioner, but State's Attorney Glasgow and other attorneys have resorted to the present information alleging contempt of court as being a safe manner to them in which to strike back at the petitioner; Mr. Glasgow being himself the complaining witness before the grand jury, it was necessary that a special State's Attorney be appointed to conduct any grand jury proceedings against this petitioner. A special order was obtained by State's Attorney Glasgow appointing Oliver D. Mann of Danville, Illinois, a practicing attorney there, to conduct the ensuing grand

jury proceedings and investigation, but such order, however, limited the proceedings of such grand jury to the single task of investigating and indicting this petitioner. The grand jury was not called to investigate all crimes and misdemeanors in Piatt County, but was called and specifically charged with the sole and only purpose of indicting this petitioner, of which petitioner was not reliably informed until December 23, 1941. After learning of the nature and purpose of these grand jury proceedings the petitioner continued to exercise the right as a citizen of informing the public through the Liberty Press of what he deemed to be official misconduct in Piatt County; and he exercised also the right of the citizen when made the subject of unjust attack or the threatened improper use of the criminal process to defend himself before the bar of public opinion, a right which is preserved to him under the Constitution of the State of Illinois and a duty which he owes to himself, his own family and those who bear his name.

The amended information is predicated upon the thought that the articles did reach the hands of the grand jurors and necessarily therefore unlawfully influenced the actions of the grand jury, or unlawfully tended to do so, and interfered with the processes of the court and the due administration of justice in a criminally unlawful way.

The theory of the prosecution in the Circuit Court of Piatt County was and is so broad that it would comprehend the following situation: if a newspaper published in the City of Chicago, Illinois, had been engaged in publishing a series of articles on conditions in down-state counties, including Piatt County, in which the identical facts printed in the Liberty Press had been included, and had copies of such paper in the ordinary course of mail, or circulation from newsstands, or through transmission by private individuals in Piatt County, reached the grand jurors, the

publisher of the paper would have been held in contempt. The soundness of this legal theory the petitioner has contested in every court heretofore.

The grand jury with whose deliberations this petitioner was charged with interfering was convened to investigate the conduct of this petitioner to ascertain whether he had through the publication of facts and opinions in the Liberty Press, been guilty of criminal libel in violation of the Statutes of the State of Illinois. The petitioner has maintained in the courts below that the statements in the Liberty Press did not constitute criminal libel under the Statutes of Illinois because they were within the federal constitutional guarantees of free speeech and free press. The petitioner has also at all times taken the position that the circulation of the Liberty Press with the various statements of facts therein, in the normal and ordinary course of the mail, or by house to house delivery among the citizens of Piatt County, including the said grand jurors—as the answer shows how they were delivered, if delivered—could not be regarded as undue or illegal interference with the courts and the due administration of justice, because the statements and the circulation thereof were accomplished within federal constitutional guarantees for free speech and free press.

As to the petition for habeas corpus filed in the United States District Court for the Eastern District of Illinois, the facts contained therein having been set out in the pleadings and statements hereinbefore, so no useful purpose can be here served in restating them again, but, in brief, the grounds relied upon are to the effect that the filing of the amended information in the Circuit Court of Piatt County, Illinois, did not contain any good and sufficient grounds to support the judgment of the court entered thereon; that the offenses charged were not acts

of contempt committed within the presence of the court, but were acts committed—if at all—beyond the presence of the court; that the verified answer of the petitioner to the amended information purged the petitioner of all charges even if they were otherwise competent and proper charges,—which petitioner denies that any were proper or competent charges; that the judgment being void, the order of commitment was void and that the imprisonment of this petitioner under a void order constitutes and is a proper matter for the petitioner to be relieved of under the constitution of the United States and the decisions of this court; that petitioner had exhausted all remedies under the laws of the State of Illinois to avoid serving of the jail sentence and the payment of the fine; that under these factual matters of record petitioner earnestly contends that his rights under the federal constitution have been violated and will continue to be violated unless he is saved therefrom by the order and judgment of this honorable Court. Petitioner believes that he has been denied due process of law and has been deprived of his liberty in violation thereof through the decisions of the courts of Illinois, and the decisions of the two lower federal courts.

Petitioner does not cover in either the petition or the brief herein, the question whether or not he has exhausted all of his remedies in the State Courts and for two reasons,—first, he believes that the record clearly shows that all such remedies have been exhausted within the requirements laid down by this Court; secondly, and because the point was not decided by either, the United States District Court, or the Circuit Court of Appeals.

IV.

Specifications of Error.

1. That the Circuit Court of Appeals for the Seventh Circuit erred in affirming the decision of the United States District Court for the Eastern District of Illinois and in adopting as its own the opinion of Judge Walter C. Lindley of the District Court for the Eastern District of Illinois, which opinion appears at R., pp. 74-85.

Bridges v. *State of California*, 314 U. S. 252.

2. Said Court erred in holding that the petitioner had not been denied due process of law through abridgment or the deprivation of the right of free speech and free press by the action of the Circuit Court of Piatt County, Illinois.

The District Judge Walter C. Lindley, in the opinion adopted by the Circuit Court of Appeals, refers to an Act of Congress forbidding communication with Grand Jurors. (Rec. p. 80.) There is no such statute in Illinois, and if copies of the Liberty Press reached Grand Jurors (Rec. pp. 27-29), no statute of the State of Illinois was violated thereby. Singularly, however, the Judge does not refer to another and interesting aspect of the development of legislative policy in relation to indirect contempt of the Federal Courts. In 1831, Congress took away from the Federal Courts the power to punish as contempts, acts committed out of their presence. (4 Stat. 487, 28 U. S. C. A. 385.) This has been the fixed policy of the United States for over one hundred years. It is now settled that there must appear "clear and present danger" in order to justify "restrictions upon expression where the substantive evil sought to be prevented by the restrictions is destruction of life, or property, or invasion of the right of privacy." (*Bridges* v. *State of California*, 314 U. S. 252, 262, 62 S. Ct. 190, 193.) The Court there said that the criteria "applicable under the Constitu-

tion to other types of utterances" are applicable "in contempt proceedings to out-of-court publications pertaining to a pending case." (314 U. S. at page 268.)

It is respectfully submitted that there is no evidence in the record to support the view, that there was present, such a "clear and present danger" that a "substantive evil—extremely serious", and of a "degree of imminence extremely high", impended unless restrictions upon the free constitutional right of expression were inforced. The record does not support the conclusion that the published statements were either "an inherent tendency", or a "reasonable tendency", to interfere "with the orderly administration of Justice", and yet neither of these is sufficient to justify restrictions on free expression. (314 U. S. 272, 73.)

It is rather surprising to find a decision on a matter involving the right of a press to be free, which not even mentions the standards above quoted, and in the light of which any attempted repression of a free speech and a free press must be examined. While this fact may not be conclusive, it is pertinent to note that the attempt, if one was made, to interfere with, or affect, the course of justice, failed, because the Grand Jury did, in fact, indict this petitioner under the criminal libel statute of the State of Illinois. The Bridges case indicates that what ~~virtually~~ happened, is not unimportant in such a case as this one. This Court rightly said in *Bridges* v. *State of California* (314 U. S. 252), "But we cannot ~~stand~~ with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials, and that to preserve judicial impartiality, it is necessary for Judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases." Neither is it necessary, or proper, to "close all channels of public expression" upon matters which a Grand Jury may consider, for it must be assumed that men and women, as well as Judges—who too are but men and women—have both moral ~~vicissitude~~ and

moral courage, as well as intelligence, sufficient also to weigh facts and pass fair judgment thereon, in spite of comment from persons who are still free to express themselves.

3. Said Court erred in holding that the statements published and circulated by the petitioner constituted an unlawful effort to prevent an indictment of the petitioner by the Grand Jury of Piatt County.

See argument under error 2 above.

4. Said Court erred in holding that the publication of the statements referred to in the preceding assignment of error, before an indictment had been returned, constitutes contempt of court, whereas, such publication after a decision, but before sentence, would not be contempt.

While the fact in the case of *Bridges* v. *State of California*, *supra*, was that the matter complained of had been published after indictment, but prior to the pronouncing of the sentence by the Court, no point is made in the opinion tending to show that the Court deemed the point of time in the course of the trial of the proceedings of any importance upon the question, whether or not, contempt had been committed.

Obviously, there can be no such distinction if the judicial process in a given case has not been completed before the acts charged to be contumacious have been committed. It is, ordinarily, entirely immaterial at what stage in the proceedings the acts are committed.

5. Said Court erred in holding, that advising the Grand Jurors through the publication of the Liberty Press correctly, as to the law and the procedure, unlawfully interfered with the due administration of justice and therefor was contempt of court.

If this is intended as a serious statement of a rule of law which may result in the suppression of a right of a free press, it is ~~so~~ obviously ~~uncertain~~, and of course, is wholly without support in the authorities.

It baffles our ingenuity to expose the fallacy of it,—how a correct statement of the law when brought to the attention of the Grand Jurors, can constitute an unlawful and undue interference with the process of justice, can not be comprehended by any lawyer in the United States of America, as yet. The author of this brief knows of no circumstances in which a correct statement of the law should constitute contempt of Court.

6. Said Court erred in holding that it necessarily constituted contempt of court for this petitioner to urge the duly constituted authorities of Piatt County, including the Grand Jury, to investigate illegal acts, or conduct, committed by other persons in Piatt County.

Here, again, the author of this brief must confess his inability, either to understand the proposition as stated by the lower Courts, or to find authority anywhere in support of it.

In a free country, like ours, it is not only the right of a citizen, whoever he may be, to bring to the attention of the duly constituted authorities, violations of the law,—and as early as 1797, a law of the Congress of the United States, subjected the individual citizen to penalties, if, notwithstanding knowledge of criminal conduct, he remained silent and did not complain. As indicated in the case of *Bridges* v. *State of California*, the public is interested in the complete freedom of expression and criticism upon public officers,—nor are prosecuting officers, or States Attorneys of Illinois, immune against this fundamental principle of American political life.

7. Said Court erred in holding that the decision of the Illinois Courts, to the effect that the statements of fact published in the Liberty Press "contained inherently a great likelihood of directly influencing to a serious degree the administration of justice", for the reason that unless it appeared—(as it did not)—namely, that the alleged interference through the exercise of the freedom of speeech

and of the press, was calculated to a substantial degree, to impede, or interfere with, the due administration of justice, there can be no contempt of Court.

What we say under specifications of error, Number 2, is affirmatively apt here. There was no "clear and present danger that a substantive evil, extremely serious and of a degree of imminence extremely high," would result, or resulted, from the statements circulated in the Liberty Press and impede the administration of justice.

The decision of the Supreme Court of Illinois is not, in this case, binding on this Court. The interpretation of local law and the holding of State Courts as to the meaning thereof, while generally accepted as conclusive in the Federal Courts, are not universally so. As stated in the Dred-Scott case, in the opinion of Mr. Justice McClean, "There are, it is true, many dicta to be found in our decisions, averring that the Courts of the United States are bound to follow the decisions of the State Courts on the construction of their own laws. But although this may be correct, and a rather strong expression of a general rule, it cannot be received as the enunciation of a maxim of universal application."

Dred-Scott v. *Sandford*, 19 How. 393, Page .....

8. Said Court erred in affirming the decision of the lower court and basing such affirmance upon the statement that "Grand Jurors proceeded directly to petitioner to discuss the matters and charges appearing in the Liberty Press, and being investigated by the Grand Jury", and deducing therefrom that the "administration of justice was actually interfered with." The initiative here was admittedly taken, not by the petitioner, but by the Grand Jurors themselves,—they exercising the historical function of Grand Jurors.

In the first place, it is clear that the petitioner did not seek out the Grand Jury, or the Grand Jurors, as indicated in this statement by the Court, but merely

took part in a discussion, initiated outside the Grand Jury room, and by the Grand Jurors themselves.

The Grand Jurors were not in the custory of an officer; they were free to pass from place to place, visit as they chose, and to discuss any matters that they chose with any citizen; neither did the Grand Jurors, or this petitioner, violate any law in the State of Illinois in doing what the Court, in its opinion, says they did. This ~~pretended~~ alleged contempt, or resort to this circumstance as an ingredient in a contempt of court, is incomprehensible to a lawyer and wholly indefensible.

9. Said Court erred in holding that the imposition of a sentence of three months in jail and a fine of two thousand dollars was not a violation of the federal constitution and specifically the Fourteenth Amendment thereof, as a cruel and unusual punishment.

It is respectfully submitted, without elaboration, which might unduly extend this brief, that no conviction of contempt in the whole history of the United States has brought such a severe sentence in a case where the facts and circumstances were no more convincing, or putting it differently, are as unsubstantial, as they are, in this case.

10. Said Court erred in its interpretation of the answer of petitioner in holding that the answer did not have the effect of purging him of the contempt charge.

The conclusion of the Court that the answer did not purge petitioner of the contempt charged, is entirely inconclusive. The burden to prove contempt, as charged in the information, was at all times upon the State. The burden was never upon the defendant to prove himself innocent; it was upon the State to prove him guilty. It may be conceded for argument—a concession in ~~the~~ fact we do not make—that the answer does not contain a technically complete defense. That has no bearing on the case and does not relieve the State from proving affirmatively, that a contempt was committed. If, therefore, as we contend the record

clearly shows, the information and the evidence produced by the State, did not, if admitted in its entirety to be true, constitute contempt of Court, the character of the answer is unimportant.

11. Said Court erred in holding that this petitioner admitted in his answer any unlawful delivery of the Liberty Press to any grand juror.

Petitioner admitted in substance and effect, that copies of the Liberty Press were delivered, or might have been delivered, at the homes of some or all of the Grand Jurors, as well as at the homes of nigh all of the other citizens in Monticello and in Piatt County, in the usual way, however, and in conformity with the usual method of its distribution, and not differently. Petitioner also admitted that copies might have been given upon request to some Grand Jurors who voluntarily called upon the petitioner at his office. (Rec. pp. 27-28.) The fact that copies of the Liberty Press in the normal and usual course of circulation, reached Grand Jurors, was no violation of any Statute of the State of Illinois, or of the United States, and cannot, under the criteria laid down in the case of *Bridges* v. *State of California*, constitute contempt of Court.

12. Said Court erred in holding that the state courts correctly decided that the petitioner had failed to purge himself of the contempt charge.

This has been dealt with under the foregoing assignment of errors and will not, at this time, be further elaborated, excepting to say that it has become Hornbook ~~brook~~ law that the decisions of the state tribunals interpreting the statutes of the State, are not binding or conclusive upon the Federal Courts when it is asserted by persons or corporations that rights secured them by the Federal Constitution are abridged, or violated by the interpretation challenged.

The adjudication of the Circuit Court of Piatt County, which was affirmed by the Supreme Court of Illinois, that the finding of the petitioner guilty of

contempt under the facts and circumstances detailed in this record, as this petitioner has contended and now contends, are a direct violation of the right of free speech and of free press, guaranteed him by the Federal Constitution.

"But, as has been held, very often, the question whether a state law or a tax imposed thereunder deprives a party of rights secured by the Federal Constitution, depends not upon the form of the Act, nor upon how it is construed or characterized by the State Court, but upon its practical operation and effect." *American Manufacturing Co. v. City of St. Louis*, (1918), 250 U. S. 459, p. 462, 39 S. Ct. 522; *Howard v. Fleming*, 191 U. S. 126, 24 S. Ct. 49.

Conclusion.

WHEREFORE, it is respectfully submitted that the petitioner has been aggrieved by the decision of the Circuit Court of Appeals of the Seventh Circuit, which by this petitioner, is believed to be erroneous, and that a writ of certiorari, directed to the said Court, should be issued, requesting that this cause be certified to the Supreme Court of the United States for determination, as hereinabove first petitioned for.

Respectfully submitted,

WILLIAM A. DOSS.
Petitioner, Pro Se.

APPENDIX.

Sec. 240 (a) of the Judicial Code, as Amended. (Sec. 347, Title 28 U. S. C. A.):

> "(a) In any case, civil or criminal in a Circuit Court of Appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower Court, that the case be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error on appeal."

Article II, Paragraph 4, of the Constitution of the State of Illinois:

> "Par. 4. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense."

Amendment XIV, Sec. 1, Constitution of the United States:

> "Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment VIII, to Constitution of the United States.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 934

WILLIAM A. DOSS,

Petitioner,

vs.

E. E. LINDSLEY, Sheriff, Piatt County, Illinois,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Attorney for Respondent.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.

CHAMPLIN-RHEALY COMPANY, CHICAGO 365

INDEX AND SUMMARY OF ARGUMENT.

CITATIONS.

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STATEMENT.

The facts, in so far as they are exigent with respect to a decision of this case, are fully stated in the opinion of the district court, which was made the opinion of the Circuit Court of Appeals, and in the opinion of the Supreme Court of Illinois in the case of *People* v. *Doss*, 382 Ill. 307, which opinion and decision petitioner seeks to assail by the present proceeding. The opinion of the Supreme Court of Illinois has been reprinted in full as an

Appendix to this brief for the immediate convenience of this court.

The following very few words summarize the facts sufficiently to indicate the questions presented in this case.

The petitioner, being under investigation by a grand jury in connection with accusations of criminal libel, disseminated thousands of copies of a mimeographed publication which he called *The Liberty Press,* in which he vituperatively assailed the integrity of the State's Attorney and many other members of the bar and exhorted the grand jury to investigate and indict the State's Attorney instead of investigating and indicting the petitioner. His publication of this exhortion and ts text and contents have at all times been admitted. The courts of Illinois, rejecting petitioner's contentions that such publication represented an exercise of his right of free speech, have ruled that it constituted an attempt to tamper with and corruptly influence a grand jury and, treating the publication as contemptuous, have held him subject to a fine of $500 and three months' imprisonment.

Petitioner filed a petition in this court for a writ of *certiorari,* but the same was denied as having been filed not within apt time. Upon denial by this court of petitioner's application for *certiorari* **and before petitioner was in custody,** he applied to the United States District Court for the Eastern Division for a writ of *habeas corpus* against the sheriff.

That court, as appears from its carefully written opinion, denied petitioner relief on the ground that, since he was not in custody, his body could not be produced by the respondent in response to the process of *habeas corpus.* The court did, however, consider and announce its ruling to the effect that *first,* petitioner had not exhausted other

adequate and available remedies before resorting to *habeas corpus*, and *second*, if petitioner's substantive question of the constitutional right of free speech could properly be entertained, then such contention was without merit.

It is so singular as to be astonishing that, although the only actual ground of decision was that petitioner was not in respondent's custody and hence could not be produced in response to a writ of *habeas corpus*, petitioner does not argue or even discuss that contention in this court.

THE QUESTIONS PRESENTED.

I.

Did the trial court err in denying petitioner relief on the ground that he was not in custody at the time of his application for the writ of *habeas corpus?*

II.

If the writ was not properly denied because petitioner was not in the custody at the time of the application therefor, should the writ have been denied upon the further ground assigned by the district court, namely, the ground that petitioner had not exhausted other adequate and available remedies before resorting to *habeas corpus*?

III.

If petitioner's substantive claim of the right to free speech is properly before this court, did petitioner's conduct amount to an exercise of the right of free speech or to activity contemptuous of the court which invoked the grand jury and not within the protection of the Fourteenth Amendment?

ARGUMENT.

I.

The court below properly refused the writ because petitioner was not in custody at the time of the application therefor.

The only actual ground of decision, as distinct from expressions of opinion in the nature of *dicta*, upon which the petitioner's present application for *habeas corpus* was refused was that petitioner was not in custody at the time that he applied for the writ. The district court used and the circuit court of appeals adopted the following language of the District Court:

> "In *McNally* v. *Hill, Warden*, 293 U. S. 131 at 138, the court said: 'Without restraint of liberty, the writ will not issue. *Wales* v. *Whitney*, 114 U. S. 564; *Stallings* v. *Splain*, 253 U. S. 339, 343. Equally, without restraint which is unlawful, the writ may not be used. *A sentence which the prisoner has not begun to serve can not be the cause of restraint which* the statute makes the subject of inquiry.'
>
> "From the language of the Supreme Court, it appears that where, as here, petitioner has not been arrested, his application is premature, for he is, as yet, deprived of no freedom of action. I think further that the question is not whether one who is not on bond may apply for a writ, but rather whether one convicted but not arrested may so proceed. This I think he may not do. * * *" (Italics of the court.)

There is not the slightest doubt that this conclusion was the only correct one. The summary, extraordinary and highly prerogative writ of *habeas corpus* lies only to inquire into and, in proper cases, to relieve against actual imprisonment and not to prevent threatened imprisonment.

Its office is to command production of the body. Quite clearly the writ will not lie against one who has not custody of and therefore cannot produce the body of the petitioner.

In *Johnson* v. *Hoy,* 227 U. S. 245, petitioner, who had been indicted for violation of the White Slave Traffic Act, applied for a writ of *habeas corpus* "on the ground (1) that excessive bail was required, on terms onerous and prohibitive, and (2) that the act under which he had been indicted was unconstitutional and void." But it appeared that, in the language of this court, on November 15, 1912, Johnson had given a bond, which had been approved by the district judge, and had been released from arrest under the indictment. This court said, at pages 247-48:

> "* * * But even if it could be claimed that the facts relied on presented any reason for allowing him a hearing on the constitutionality of the act at this time, the defendant would not be entitled to the benefit of the writ, because since the appeal he has given bond in the District Court and has been released from arrest under the warrant issued on the indictment. He is no longer in the custody of the marshal to whom the writ is addressed, and from whose custody he seeks to be discharged. * * *"

This court has always held that the "constructive restraint" of a petitioner by legal process and bail, even though the abridgment of the petitioner's liberty while he is at large upon bail is very substantial, and even though he is subject to physical capture and detention at any time, as, for instance, if his surety surrenders him, does not constitute that corporal detention of his body which is requisite to support the writ of *habeas corpus.*

A case very much on point is *Stallings* v. *Splain,* 253 U. S. 339. In that case the petitioner, having been indicted in the District of Wyoming for a federal offense, was

arrested and physically incarcerated in the District of Columbia. While thus actually incarcerated he filed his petition for *habeas corpus*. But before the petition was disposed of, petitioner was enlarged upon bail. His situation was thus precisely comparable in all respects material to that of petitioner in the instant case. In the *Stallings* case, petitioner was not only liable to be surrendered at any time by his bondsmen, and was not only confined in his movements to the territory within the limits of the District of Columbia, but was facing removal to Wyoming. In the instant case, although there was extant a *mittimus* for the incarceration of petitioner, petitioner was and still is physically at liberty.

In the *Stallings* case this court, speaking through Mr. Justice Brandeis, said at page 343:

> "The admission to bail by the Commissioner to answer the indictment in the District of Wyoming was upon his own request on advice of counsel. When this bail was given no application had been made to the court for his removal; and there had not even been an order of the Commissioner that he be held to await such application. He ceased, therefore, to be in the position ordinarily occupied by one who is contesting the validity of his detention and who has been released on bail pending the *habeas corpus* proceeding. *Sibray* v. *United States,* 185 Fed. Rep. 401. Stallings' position was thereafter no better than if he had applied for the writ after he had given bail. It is well settled that under such circumstances a petitioner is not entitled to be discharged on *habeas corpus*. *Respublica* v. *Arnold,* 3 Yeates, 263; *Dodge's Case,* 6 Martin, 569; *State* v. *Buyck,* 1 Brev. 460. Being no longer under actual restraint within the District of Columbia, he was not entitled to the writ of *habeas corpus*. *Wales* v. *Whitney,* 114 U. S. 564."

The case of *Wales* v. *Whitney,* 114 U. S. 564, contains an exhaustive review of the common law authorities. In

that case an officer of the navy, though physically circumscribed in his movements by an order from a superior officer to remain in the District of Columbia subject to trial on charges pending before a court martial, was held not to be detained. The navy officer contended that he was not subject to imprisonment or detention upon the particular facts in the case, by military authorities. His imprisonment and detention consisted of an order to remain within the confines of the District of Columbia under a sort of constructive military arrest and to await trial in the District before a court martial for the immediate convenience of the court. We quote at some length in the margin the review by Mr. Justice Miller of the earlier authorities.*

* "The present case bears a strong analogy to *Dodge's* Case in 6 Martin, La. 569. It appeared there that the party who sued out the writ had been committed to jail on execution for debt, and having given the usual bond by which he and his sureties were bound to pay the debt if he left the prison bounds, he was admitted to the privilege of those bounds. The plaintiff in execution failing to pay the fees necessary to the support of the prisoner, the latter sued out a writ of *habeas corpus*.

"That eminent jurist, Chief Justice Martin, said, on appeal to the Supreme Court: 'It appears to us that the writ of *habeas corpus* was improperly resorted to. The appellee was under no physical restraint, and there was no necessity to recur to a court or judge to cause any moral restraint to cease. The sheriff did not retain him, since he had admitted him to the benefit of the bounds; the doors of the jail were not closed on him, and if he was detained it was not by the sheriff or jailer. If his was a moral restraint it could not be an illegal one. The object of the appellee was not to obtain the removal of an illegal restraint from a judge, but the declaration of the *court* that the plaintiffs in execution had by their neglect lost the right of detaining him. A judgment declaring such neglect, and pronouncing on the consequences of it, was what the appellee had in view.' The judgment awarding the writ was reversed. The analogy to the case before us is striking.

"A very similar case was passed upon by the Supreme Court of Pennsylvania in *Respublica* v. *Arnold*, 3 Yeates, 263. A party who had been indicted for arson, and had given bail for his appearance to answer the indictment, applied, while out under bail, to be discharged by writ of *habeas corpus*, on the ground of delay in the prosecution. The court held that the statute of Pennsylvania, which was a re-enactment of the *habeas corpus* act of 31 Charles II., ch. 2, spoke of persons *committed* or *detained*, and clearly did not apply to a person out on bail. And Mr. Justice Yeates very pertinently inquires 'would not a *habeas corpus* directed to the bail of a supposed offender by perfectly novel?' And Smith J., said that the inclination of his mind was that *habeas corpus* could not lie to the bail. (Quotation continued on next page.)

After this review of authorities, Mr. Justice Miller, speaking for the court, concludes:

> "In the case of a person who is going at large, with no one controlling or watching him, or detaining him, his body cannot be produced by the person to whom the writ is directed, unless by consent of the alleged prisoner, or by his capture and forcible traduction into the presence of the court."

In the Statement of the Case we have already commented upon the astonishing circumstance that, although the trial court's holding was placed solely upon the ground that petitioner was not in custody at the time of his application for the writ, or at the time of the return thereof, pe-

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"In a note to the cases of *Rex* v. *Dawes* and *Rex* v. *Kessel*, 1 Burrow, 638, the same principle is stated, though by whom the note is made does not appear. Both these persons were brought before Lord Mansfield, in the King's Bench, on a rule against the commissioners to enforce an act of Parliament to increase the army. In both cases the ground on which the discharge was asked was, that they were illegally pressed into the service. Lord Mansfield discharged one because his statement was found to be correct, and refused the other because his statement was not true.

"The note to the report, apparently in explanation of the fact that they were not brought before the court by writ of *habeas corpus*, and that no objection was taken to the rule by the commissioner, says: 'Neither of these could have brought a *habeas corpus;* neither of them was in custody. Davies had deserted and absconded, and Kessel had been made a corporal. No objection was made by the commissioner to the propriety of the method adopted.' In the continuation of Chief Baron Comyns' Digest, published in 1776, and in Rose's edition of that Digest, these cases are cited as showing that the parties could not bring *habeas corpus*, because they were not in custody. Comyns' Digest, Continuation, p. 345; 4 Comyns' Dig. (4th ed. 8vo, London, 1800) 313; *Habeas Corpus B.*

"While the acts of Congress concerning this writ are not decisive, perhaps, as to what is a restraint of liberty, they are evidently framed in their provisions for proceedings in such cases on the idea of the existence of some actual restraint. Rev. Stat. § 754 says the application for the writ must set forth 'in whose custody he (the petitioner) is detained, and by virtue of what claim or authority, if known;' § 755, that 'the writ must be directed to the person in whose custody the party is; § 757, that this person shall certify to the court or justice before whom the writ is returnable the true cause of the detention; and by § 758 he is required 'at the same time to bring the body of the party before the judge who granted the writ.'

"All these provisions contemplate a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary."

titioner does not argue any question raised by this holding. Instead, for reasons as to which he alone is advised and of the soundness of which he alone is the judge, but which are quite incomprehensible to us, he has chosen to argue only upon his altercation with the holding of the Supreme Court of Illinois, namely, the acts of which he admits commission were contempt of court. Although it is believed that these contentions, if they are properly before the court, are fully answered under Point III, *post*, of this brief, we submit that upon the reasoning of the District Court, with which petitioner does not argue, the petition was properly dismissed because petitioner was not in custody and could not have been brought before the court by the respondent at the time of his application for the writ of *habeas corpus*.

II.

Petitioner has not exhausted more appropriate means than habeas corpus for the vindication of his alleged rights.

There existed a very orderly procedure whereby the petitioner could have and should have elicited this court's rulings upon the substantive contention which he now seeks to make. He could have and should have, within apt time after the affirmance of his sentence and commitment for contempt, prosecuted an application for this court's writ of *certiorari* to review the decision of the Supreme Court of Illinois. (Illinois Supreme Court decision, *People* v. *Doss*, 382 Ill. 307.) Although petitioner did file a petition for writ of *certiorari*, he did so in apt time. On October 11, 1943, this court entered a memorandum opinion (320 U. S. 762) as follows: "No. 100. *Doss* v. *Illinois*. October 11, 1943. Petition for writ of certiorari to the Supreme Court of Illinois denied for the reason

that application therefor was not made within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U. S. C., § 350."

He filed a petition for rehearing with respect to the order last set forth, which was denied on November 15, 1943 (320 U. S. 813).

Petition for *certiorari* is the ordinary, *habeas corpus* an extraordinary remedy. The recent press of *habeas corpus* cases has constrained this court to recur many times to its decisions in *Ex Parte Hawk*, 321 U. S. 114, and *Mooney* v. *Holohan*, 294 U. S. 103. Both of these cases hold that a petitioner should pursue the ordinary course afforded to him by state supreme and appellate procedure before invoking the special and limited jurisdiction of federal courts by the extraordinary and summary remedy of *habeas corpus*.

By failing to elicit this court's review of the Illinois Supreme Court's decision upon seasonable application for the writ of *certiorari*, he has brought himself squarely within the teaching of this important principle.

Both the District Court and the Circuit Court of Appeals assign the further ground for denying petitioner access to the federal courts upon *habeas corpus* the fact that he had not applied to the Illinois courts for *habeas corpus*. In fairness to the petitioner and to this court, we are compelled to confess that, since the Supreme Court of Illinois has passed directly and adversely to petitioner upon the only substantive contention that he makes here, namely, his contention that his communications to the grand jurors were an exercise of his constitutional right of free speech and hence could not have been contemptuous, it should be fairly presumed that further recourse to the Illinois courts would be unavailing.

But this does not excuse his failure to properly and aptly to prosecute his application for *certiorari* to this court. For this reason, the writ of *habeas corpus* was properly denied.

III.

There is no merit in petitioner's substantive contention that his acts were an exercise of his constitutional right of free speech.

Although we submit that the petitioner's substantive claim of the constitutional right of free speech is not properly before this court in this proceeding, *first,* because petitioner, not being in custody, was not subject to production on *habeas corpus* (Point I, *ante*) and *second,* because he failed to exhaust ordinary before pursuing extraordinary remedies (Point II, *ante,*) nevertheless under the present Point we address petitioner's contentions as though they were properly before this court in a proceeding free from jurisdictional infirmities or procedural inhibitions.

The justices of this court need no instruction from the Attorney General of Illinois upon the evolution of the grand jury as an organ of government. This court knows that originally, jurors, both grand and petit, were not only permitted but were expected to give their verdicts and to make their presentment upon their own personal knowledge, information, belief or conjecture. Indeed, as this court knows, jurors were originally witnesses, then were permitted to "consult" with persons who were allowed to "testify" but not to vote, and finally, in the case of petit juries, were required to find their verdict only upon evidence and, so far as human psychology, aided by the instruction and admonition of a court will permit, to ex-

clude from their mind all personal knowledge, particular or peculiar to the case.

This brief reference to the well known evolutionary process by which the present jury system emerged from a Teutonic forum or assembly of fact triers teaches that, in the state courts, at least, the Federal constitution, which does not guarantee either indictment or trial by jury at all in state courts, imposes no inhibitions upon the reasonable development and evolutionary modification of juridical concepts implicit in either trial or presentment by jury, petit or grand. Illinois was committed long before the *Doss* case to the view, modern and progressive, which inhibits grand juries, as well as petit juries, from availing themselves of common gossip as either incitement to act or evidence upon which to act.

The case of *People* v. *Parker*, 374 Ill. 524, so thoroughly discussed this point that in petitioner's case, it was necessary only to cite the *Parker* case. We quote from the *Parker* case the Supreme Court's perception of the flux and contrarity of opinion upon the appropriate function of a grand jury with respect to informal or other unofficial communications either of matter of fact or matter of course. In frank recognition that the evolution of the modern jury system from a primitive mode of what might be called presentment and trial by gossip, the Supreme Court said at page 528:

> "The authorities in other jurisdictions cannot be harmonized. Some courts hold that a stranger has a right voluntarily to bring facts to the knowledge of the grand jury. (*In re Lester*, 77 Ga. 143; *State* v. *Stewart*, 45 La. Ann. 1164.) On the other hand, Wharton, in his treatise on Criminal Practice and Pleading, eighth edition, section 307, states: 'Sending an unofficial volunteer communication to the grand jury, inviting them to start, on their own authority,

> a prosecution, is a contempt of court, and a misdemeanor at common law.' To this same effect is *Commonwealth* v. *Crans*, 2 Pa. L.J. 172."

This represents the settled and declared jurisdiction of Illinois on the question.

Mr. Justice Field, in a celebrated charge to a federal grand jury which has been frequently quoted, 30 Fed. Cases 992, spoke as follows:

> "You will not allow private prosecutors to intrude themselves into your presence and present accusations. Generally such parties are actuated by a private enmity and seek merely the gratification of their personal malice. If they possess any information justifying the accusation of the person against whom they complain they should impart it to the district attorney who will seldom fail to act in a proper case, but if the district attorney should refuse to act they can make their complaint to a committing magistrate before whom the matter can be investigated and if sufficient evidence be produced of the commission of the public offense by the accused, he can be held to bail to answer to the action of the grand jury."

He is also quoted by Wharton on Criminal Procedure, tenth edition, section 1295, as follows:

> "There has hardly been a session of the grand jury of this court for years at which instances have not occurred of personal solicitation to some of its members to obtain or prevent the presentment or indictment of parties. And communications to that end have frequently been addressed to the grand jury filled with malignant and scandalous imputations upon the conduct and acts of those against whom the writers entertain hostility, and against the conduct and acts of former and present officers of this court and of previous grand juries of this district. All such communications were calculated to prevent and obstruct the due administration of justice, and to bring the proceedings of the grand jury into contempt. 'Let any reflecting man', says a distinguished judge, 'be

> he layman or lawyer, consider of the consequences which would follow, if every individual could, at his pleasure, throw his malice or his prejudice into the grand jury room, and he will, of necessity, conclude that the rule of law which forbids all communication with grand juries, engaged in criminal investigations, except through the public instructions of courts and the testimony of sworn witnesses, is a rule of safety to the community. What value could be attached to the doings of a tribunal so to be approached and influenced? How long would a body, so exposed to be misled and abused, be recognized by freemen as among the chosen ministers of liberty and security? The recognition of such a mode of reaching grand juries would introduce a flood of evils, disasterous to the purity of the administration of justice, and subversive of all public confidence in the action of these bodies.' "

Illinois has long had a statute requiring proceedings before her grand juries to be secret. The Illinois Criminal Code (Ill. Rev. Stats., 1943, Ch. 38, Par. 720, p. 1226), which prohibits disclosures of matters occurring in the grand jury room, has been enforced by the Supreme Court of Illinois so as to prevent the communication, even in court, of the substance of grand jury proceedings. *Gitchell* v. *People*, 146 Ill. 175.

The policy of forbidding informal and unofficial communications with grand jurors, even when such communications are moderate in tenor and do not amount to an attempt to incite in the grand jury a lack of confidence in the prosecuting official, has found utterance in congressional enactment. Section 137 of the U. S. Criminal Code (U.S.C.A. Title 18, Sec. 243) provides as follows:

> "Whoever shall attempt to influence the action or decision of any grand or petit juror of any court of the United States upon any issue or matter pending before such juror, * * * by writing or sending to him any letter or any communication, in print or writing,

in relation to such issue or matter, shall be fined not more than $1,000, or imprisoned not more than six months, or both."

An examination of the case of *Duke* v. *United States*, 90 Fed. (2d) 840, (*certiorari* denied, considered on certification of question, 301 U. S. 492, *certiorari* denied after decision by Circuit Court of Appeals, 302 U. S. 685), indicates that this court has considered, otherwise than by merely denying *certiorari, the* constitutionality of this statute and has implicitly held it constitutional. In the Circuit Court of Appeals for the Fourth Circuit (90 Fed. (2d) 840), Duke assailed the constitutionality of this statute upon the specific ground that its enforcement violated his constitutional right of free speech. The Circuit Court of Appeals rejected this contention in language quoted in the margin*.

This court denied *certiorari*. (302 U. S. 685.)

Although we are mindful that mere denial of *certiorari* does not of itself import this court's approbation of the opinion of the lower court, in the *Duke* case, the Circuit Court of Appeals had certified to this court a question (raised by Duke's contention that he could not be prosecuted by information) which this court answered adversely to Duke in 301 U. S. 492. Although this court did not expressly discuss the constitutional issue, it was apprised of Duke's contention that the statute was unconstitutional and nevertheless approved his conviction, though it wrote an opinion on another phase of the case. We therefore

*"There is no right on the part of one whose conduct is being investigated by a grand jury to petition the grand jury or to appear before it, which is guaranteed by the Constitution or otherwise; and it is important that the processes of criminal justice be not thus interfered with by those who have reason to think that their conduct is under investigation. * * * Congress for the protection of grand and petit jurors from this sort of interference has not only forbidden attempts to influence them 'corruptly, or by threats or force, or by any threatening letter of communication' (section 135, Crim. Code, 18 U. S. C. A. #241), but has also forbidden any attempt to influence by the sending of any letter relating to any matter pending before them."

read this case as a strong intimation of this court's approval of the constitutionality of the federal act.

Petitioner in the instant case seeks to derive some comfort from the fact that the State of Illinois has adopted no such statute, but the only question which petitioner may properly address to this court is whether the State of Illinois may prohibit unofficial communications to grand jurors. No question of Illinois distribution of powers can be a Federal question. What Illinois might do by her General Assembly, she may do by the evolution of her common law with respect to her conception of her grand jurors and with respect to her conception of their inquisitorial office in public prosecutions.

In any event, petitioner is incorrect in his premise, for Illinois officially has a statute already cited, making grand jury proceedings secret. A broadside of publication of charges vitiates the secrecy of grand jury proceedings

Petitioner's contention that his communications represented a seemly approach to the grand jurors hardly deserves a reply. Petitioner's communications were far more than a mere statement of facts with respect to which petitioner was prepared to give evidence if required. They abounded in inflammatory epithets, vituperative characterizations, intended and calculated to engender the passions of the grand jurors and to prevent a calm investigation into the charges against petitioner.

Little need be said with regard to the *Bridges* case. A judge is presumed to be reasonably free from impulsion by an inflammatory press. If any such presumption attended jurors, every juror who was locked up to protect his verdict from affection by informal communication would give such a confined juror a right to the writ of *habeas corpus*.

We submit that no serious or substantial issue or freedom of speech was involved in this case.

IV.

Petitioner's other contentions are not substantial.

We shall not reply to petitioner's contention that a fine of ~~$500~~ and three months in jail is a cruel and unusual punishment.

Petitioner's contention that he was denied a trial, by jury or otherwise, upon the charges made is of course without the slightest merit. He admitted the fact and the contents of the publications. No question of his motive was properly before the court. He admitted the making of publications which were intended to influence the grand jury in its actions. If we are correct in the contentions advanced under point III of this argument, that is, the contention that the publication of any communication intended to influence the grand jury may constitutionally be punished as contemptuous, it follows necessarily that petitioner may be punished; for he admits in this Court that the intent of his publications was to influence the action of the grand jury.

CONCLUSION.

For the reasons stated in the opinion of the District Court and the Circuit Court of Appeals and urged in this brief, it is respectfully submitted that petitioner's application for *certiorari* should be denied.

Respectfully submitted,

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APPENDIX.

The People of the State of Illinois, Appellee, v. *William A. Doss, Appellant,* 382 Ill. 307.

The defendant, William A. Doss, was adjudged guilty of criminal contempt by the circuit court of Piatt county and fined $2000 and sentenced to imprisonment in jail for a period of three months, the sentence to not run concurrently with any other sentence. He prosecutes a direct appeal on the ground, among others, that the order of conviction infringes the constitutional guarantees of liberty of the press and freedom of speech.

An information was filed January 15, 1942. The amended information, filed May 9, 1942, charged defendant with delivering or causing to be delivered a copy of each of five issues of *The Liberty Press,* published by him, to the foreman and a majority of the members of the Piatt county grand jury then in session investigating alleged violations by defendant of the criminal libel law which had previously appeared in his paper. It was also alleged that some of the issues of the paper were sent by mail to several of the members of the grand jury. The five issues of defendant's publication appear in the amended information. No useful purpose can be served by narrating, in detail, the voluminous contents of the issues of *The Liberty Press* sent by defendant to the grand jury. It suffices to observe that the language of the excerpts is intemperate in the extreme, and consists largely of accusations against the members of the bar of Piatt county, attacks against the State's Attorney of the county, and, also, the special State's Attorney who was appointed special prosecutor to act with reference to the questions concerning the alleged violations of the criminal libel law by defendant, and of repeated efforts to dissuade the grand jury from returning indictments against him. Those portions of the five issues made a part of the amended information abound in vilifying and vituperative statements concerning the objects of defendant's spleen. The articles urge the grand jurors to not follow the advice and recommendations of the prosecutors and, instead, to be guided by the advice of the defendant. Defendant's mo-

tion to strike the information was overruled. Thereafter, he answered, admitting that he published the five issues of *The Liberty Press* in question, and delivered or caused to be delivered a copy of each of them to the foreman and the majority of the members of the grand jury, and that he mailed copies to other members of the grand jury, but denied that they constituted contempt of court, or that they were intended to wrongfully influence the grand jury in the performance of its duty.

In the meantime, on February 10, 1942, defendant applied for a change of venue from Judge W. S. Bodman, presiding judge of the circuit court of Piatt county. His application was granted and, on February 10, he filed a petition for change of venue from Judge F. B. Leonard, another of the judges of the circuit court. No formal order was entered with respect to this second petition. It was, however, in effect, acted upon and allowed by Judge C. Y. Miller, the third of the judges of the circuit court, on March 6, in a written statement in which he stated that he would not try the contempt charge, and that the three judges had decided that the administration of justice would be best served by asking the Supreme Court to assign a trial judge to the county. March 11, 1942, on motion of the three judges of the sixth judicial circuit, this court ordered that Judge James V. Bartley, one of the circuit judges of the twelfth judicial circuit, be assigned to preside in the circuit court of Piatt county, at such times and for such period as may be necessary to dispose of the matters pending against William A. Doss. May 19, 1941, defendant filed a petition for change of venue from Judge Bartley. This petition was denied.

Defendant contends that the denial by Judge Bartley of the petition for change of venue constitutes reversible error. The contempt charged against defendant was a constructive criminal contempt committed out of the presence of the court, one which partakes of a criminal nature. Section 26 of the Venue Act provides that no more than one change of venue shall be granted to a defendant. (Ill. Rev. Stat. 1941, chap. 146, par. 26.) The right to a change of venue is statutory, and the applicant must bring himself within the statutory requirements. (*People* v. *Touhy,* 361 Ill. 332; *Hutson* v. *Wood,* 263 *id.* 376.) Defendant was

granted a change of venue from Judge Bodman and was, for all practical purposes, granted a second change of venue from Judge Leonard. His complaint is that his third request was refused. For the adequate reason that under section 26 of the Venue Act he was entitled to only one change of venue, there was no error in the denial of the petition by Judge Bartley. Defendant argues, however, that the amended information, filed May 9, 1942, constituted a new cause of action, and that, hence, the previous changes of venue cannot be considered. No authority is cited, and we have been unable to find any, for this novel proposition. It is elementary that the filing of an amended information or an amended complaint does not necessarily constitute a new cause of action. Moreover, defendant is not in a position to contend that the amended information presented a new cause of action against him since he has failed to include the original information in either the record or his abstract. Upon the record thus made, there is no possible way of determining whether the amended information did, as asserted, constitute a new cause of action.

Apart from the fact that defendant has failed to satisfy procedural prerequisites with respect to his contention concerning change of venue and that substantive grounds adequately support the denial of this third petition, there is respectable authority for the proposition that statutory provisions relative to change of venue do not apply to proceedings to punish contempts, unless such proceedings are expressly included, *eo nomine,* in the statute. (Rapalje on Contempts, p. 110; *State of Oklahoma ex rel. Short* v. *Owens,* 125 Okla. 66; *Van Dyke* v. *Superior Court,* 24 Ariz. 508; *Tucker* v. *State,* 35 Wyo. 430.) The reason assigned for inapplicability of change of venue statutes to contempt proceedings is that a contempt is neither civil nor criminal in fact, but *sui generis.*

Defendant claims that he was entitled to a trial by jury, as requested. In a case, as here, where a contempt proceeding is instituted to maintain the court's authority and to uphold the administration of justice, and where the acts charged were not committed in the presence of the court, a sworn answer denying the alleged wrongful acts is conclusive, extrinsic evidence may not be received to impeach it, and the defendant is entitled to his discharge. (*People*

v. *Whitlow,* 357 Ill. 34; *People* v. *McDonald,* 314 *id.* 548; *People* v. *Seymour,* 272 *id.* 295.) If the answer is false, the remedy is by indictment for perjury. (*People* v. *McLaughlin,* 334 Ill. 354.) On the other hand, if the answer admits the material facts charged to be true and the facts constitute a contempt of court, punishment is imposed. (*People* v. *Parker,* 374 Ill. 524; *People* v. *Seymour, supra.*) In either event, the offender is tried solely upon his answer. It follows, necessarily, that the defendant is not entitled to a trial by jury because no issue of fact is or can be formed for a jury to try. *People* v. *Seymour, supra; O'Brien* v. *People,* 216 Ill. 354.

The gist of several errors relied upon by defendant for a reversal is to the effect that the amended information should have been stricken on his motion. It is now definitely settled in Illinois that written communications to members of a grand jury while in session, containing malicious accusations against private citizens and public officials, including the State's Attorney, and couched in such language that they can serve no useful purpose but show only personal enmity, constitute contempt of court as an unauthorized interference with the administration of justice, even though the letters do not refer to cases pending before the grand jury. (*People* v. *Parker, supra.*) The amended information satisfies the requirements of the law as a pleading, and it affirmatively appears from the information that defendant sent copies of five different issues of his paper to members of the grand jury while in session, with respect to matters pending before the grand jury directly affecting defendant himself. The motion to strike was properly overruled.

In an analogous case, *Commonwealth* v. *McNary,* 246 Mass. 46, the Supreme Judicial Court of Massachusetts, in deciding, as a matter of law, that the sending of a letter by one under investigation to members of the grand jury, in view of attending circumstances, could have been found to be a contempt of court, observed:

> "The court has the power and is charged with the duty of punishing for contempt any one whose conduct interferes with or has a tendency to obstruct the grand jury. Such conduct is as much contempt, and punishable as such as that which interferes with or has a

tendency to obstruct the administration of justice in the courts in another form or manner. It may be as necessary to put forth the power of the court to protect itself against contempts committed against this instrumentality of justice as against others. It is a contempt of the court of which the grand jury is a part to obstruct its normal and legal functions."

Defendant complains that the court erred in declining to permit him to produce witnesses, including two members of the grand jury, upon the hearing of the contempt proceeding. In a contempt alleged to have been committed beyond the presence of the court, no evidence other than defendant's sworn answer can be heard and considered by the court in the determination of his guilt or the enormity of the offense. (*People* v. *Severinghaus*, 313 Ill. 456.) In short, error would have been committed had the court allowed witnesses to testify in this action.

Defendant contends that the court erroneously adjudged him guilty of contempt. It is established that when communications to a grand jury having a tendency to directly impede, embarrass or obstruct it in the discharge of any of its duties remaining to be discharged after the publications were made, such publications constitute contempt. (*People* v. *Parker, supra.*) It is manifest that defendant was seeking, by all means at his command, to influence the grand jury in its deliberations concerning the criminal charges under investigation with respect to the alleged criminally libelous articles published by him in *The Liberty Press.* His paramount purpose was to influence the grand jury to not indict himself. The publications go further and indirectly, if not directly, urge that several members of the bar of Piatt county, including the State's Attorney, be indicted. In addition, he repeatedly professed innocence of any criminal charges, told the grand jurors that the State's Attorney was not correctly advising them concerning the law, and arrogated to himself the duty of instructing the grand jury as to the law. Defendant's actions were highly contumacious, as he well knew. More than five years ago he had been charged with circularizing the grand jury by mail regarding a matter to come before it. He admitted mailing the articles in question to each grand juror prior to the meeting of the grand jury. Particularly pertinent

is our observation made at the time of defendant's disbarment (*In re Doss*, 367 Ill. 570):

> "The publication of the newspaper articles, regardless of when they appeared, and especially the circularization of the grand jury are especially to be condemned. The invariable effect of this sort of propaganda is to create disrespect for the courts and bring the legal profession into disrepute with the public."

Defendant argues, however, that his efforts neither influenced nor appreciably affected the actions of the grand jury. The success or failure of an attempt to influence the jury is not the test of liability, since no one can know what, if any, effect it had. (12 American Jurisprudence, Contempt, sec. 37.) Defendant's contention does not, however, square with his argument, as he states in his brief that the actions of the State's Attorney and Special State's Attorney "undoubtedly did unlawfully so interfere with the grand jury's actions and deliberations that it netted them, according to the record, four indictments, although I admit they had demanded more indictments." We do not deem it material whether defendant's actions actually influenced the grand jury. That he intended the five issues of *The Liberty Press* to influence the grand jury is beyond doubt. They reflect a coolly calculated tendency to directly impede, influence, embarass and obstruct the grand jury in the discharge of its duties. The constitutional guaranties invoked by defendant were never intended to and do not sanction such conduct as exhibited by defendant. These rights are not absolute. Neither liberty of the press nor freedom of speech have yet become license.

Finally, defendant complains that the punishment imposed was too severe. A disavowal, or denial under oath, of intent to insult the court or to slander or deter the grand jury in its duty, should be considered by the court in mitigation of the offense but it cannot be considered as a complete justification. (*People* v. *Parker, supra; People* v. *Severinghaus, supra.*) By his own admission, defendant published and circulated copies of *The Liberty Press* "by the thousands," in Piatt county, thereby indicating he was well able to pay the fine. Defendant was for approximately thirty years a member of the bar of this State and during this period he occupied positions of public honor and

responsibility as county judge and State's Attorney of Piatt county. As an active practitioner, as a former jurist and a former prosecutor, he was particularly well qualified to know the effect likely to be produced upon the grand jury by the articles written and published by him in *The Liberty Press.* These circumstances, together with the admonition of this court in 1937 render his conduct in forwarding the papers to the grand jurors inexcusable.

The order of the circuit court is affirmed.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 934

WILLIAM A. DOSS,

Petitioner,

vs.

E. E. LINDSLEY, SHERIFF, PIATT COUNTY, ILLINOIS,

Respondent.

REPLY BRIEF OF PETITIONERS TO THE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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ERRONEOUS STATEMENTS OF FACT CORRECTED.

On page 2 of the Brief in Opposition, counsel says:

> "The petitioner, being under investigation by a grand jury in connection with accusations of criminal libel, disseminated thousands of copies of a mimeographed publication which he called THE LIBERTY PRESS, in which he vituperatively assailed the integrity of the State's Attorney and many other members of the bar and *exhorted the grand jury to investigate and indict the State's Attorney instead of investigating* and indicting the petitioner."

Is it possibly defamatory to suggest that one has a right to expect from the—at the moment—highest law officer in

the State a somewhat higher standard of care in dealing with the facts than is illustrated in the emphasized portion of this statement? It is untrue and evidences a deliberate attempt to prejudice this petitioner's case in this Court. One reference to the Record must suffice as proof of the falsity of this charge by the Attorney General. On page 40, of Liberty Press, issue of November 8, 1941, this petitioner said:

> "Is this a country where there is justice and freedom for all alike? I'm not asking the Grand jury to not investigate about me—I'm offering to help them do all that—but what I am charging that Grand-jury, is with notice of my willingness to appear as a witness, so why stop your investigations at my door? Is Shonkwiler's house or Glasgow's house more privileged than mine? Will Glasgow or Shonkwiler submit to be a witness before the Grand Jury on the same terms that I have agreed to do myself? I'll wager neither of them will * * *."

Again, on page 2 of counsel's reply brief, he says:

> "Upon denial by this court of petitioner's application for *certiorari* and *before petitioner was in custody*, he applied to the United States District Court for the Eastern Division for a writ of *habeas corpus* against the sheriff."

In the first place, the Attorney General here *assumes* one of the propositions he tries to put in issue, and the lower court did not have enough confidence in its merit to base its ruling on it. In the second place, it is incorrect, both as a statement of fact and of a legal conclusion.

Again, on page 3 of his brief, counsel says:

> "It is so singular as to be astonishing that, although the only *actual* ground of decision was that petitioner was not in respondent's custody and hence could not be produced in response to a writ of *habeas corpus*, petitioner does not argue or even discuss that contention in this court."

The answer to that is simple. The lower court seemingly did not have enough faith in the point to rest its decision on it. The proposition is so clearly lacking in merit that we did not discuss it in detail before. We shall do so now, since it is raised.

I.

The petitioner was, in legal contemplation, restrained of his liberty when he applied for the writ. The record justifies the conclusion that he was either in the actual custody of his sureties or of the sheriff, the latter being in any event ready to seize and imprison him (Rec., 64, 66-7). Neither the Attorney General nor the district judge refer to the statute of the State of Illinois which permits the sureties to arrest or take the principal into custody "at any place" for the purpose of surrendering him. R. S., Illinois, March 27, 1874, p. 348, div. 3, Sec. 12.

The fact unequivocally is (Rec., 65) that the seizure of petitioner *at least impended* on December 1, 1943; that the circuit clerk of Piatt County had in her hands on December 1, 1943 the

> "mandate of the clerk of the Supreme Court of the State of Illinois * * * commanding (the circuit clerk of Piatt County) to issue a mittimus to E. E. Lindsley, sheriff of Piatt County, Illinois, commanding the said sheriff to take the body of * * * William A. Doss, and imprison him in the county jail"

(Rec., 65). On the same day, December 1, 1943, petitioner filed his petition for a writ of habeas corpus in the United States District Court. On the same day the U. S. Marshal served the summons on respondent Lindsley (Rec., 64). On December 8, 1943, Lindsley answered, admitting the order to him to seize petitioner, but denying that the judgment finding petitioner guilty was "void and without any force and effect." *He does not deny that he had petitioner*

in custody or that petitioner is restrained of his liberty by the sureties on the recognizance bond, as they may do "at any place." R. S., Illinois, March 27, 1874, p. 348, Div. 3, Sec. 12 (Rec., 66-71). No one knew better than respondent Lindsley whether he had such custody of petitioner as to be able to produce him in court if ordered to do so. He nowhere intimates that he cannot produce the body of the petitioner, because he does not have him in custody; nor does he deny that the sureties have him in custody under the Illinois law empowering them to do so.

The respondent in his answer undertakes to *interpret* the petition (Rec., 70) as showing that

> "defendant does not have the custody of * * * William A. Doss * * * and that said William A. Doss is at liberty on bond."

He does not allege or deny that petitioner is restrained. This is a legal conclusion and is, moreover, incorrect. The petitioner alleged that he had been free on a bond "pending the appeal" (Rec., 3); but the appeal had been decided *against* him and certiorari had been denied by this Court. So that this stay bond had become *functus officio* and no longer served to save him from imprisonment in view of the facts shown. *The sheriff answers upon the theory that the judgment is correct and that this petitioner is correctly and properly in custody and should abide by the sentence and judgment of the court* (Rec., 66-71). This idea that petitioner was not technically in custody is an obvious afterthought in an inglorious attempt to prevent petitioner from presenting his federal questions for determination in the federal courts.

The respondent impliedly admits that the petitioner was restrained of his liberty. He does not plead that he was not so restrained and should not now be permitted to raise an issue he should have raised below, thereby giving petitioner an opportunity to meet the issue in some appropriate

procedure. In *Sallee* v. *Werner et al.*, 171 Ill. App. 96, 99 (1912), we see how a prisoner may be restrained by his sureties:

> "Geiss and Halford, having secured plaintiff to enter into recognizance for their appearance in the Sangamon County Court, thereby placed themselves in his custody and by this act gave him authority to seize or arrest them at any time thereafter and return them to the authorities of Sangamon County * * *."

An important and distinguishing fact is entirely overlooked by the Attorney General in his brief. For the sake of argument let us assume that the record warrants the assumption that the petitioner surrendered himself in order to apply for a writ. If so, the facts show that he is entitled to a writ. The petitioner was found guilty of contempt under *State* process; he exhausted all his remedies in the *State* courts and unsuccessfully applied for certiorari to *this* Court; and assume he, thereupon, surrendered to the *State authorities*—having no other choice—and he in fact did apply to the *federal* court for the protection of his constitutional rights. Put negatively, *this is not a case* where (1) a prisoner voluntarily surrenders to a *State* official or to his sureties in a *State* proceeding in order to apply to a *State court* for a writ of *habeas corpus*. In each of these situations it may be that a question arises whether there is such restraint of liberty as is a prerequisite to a right to a writ. Here, however, the petitioner, constructively or actually in the custody of his sureties, whose obligation to deliver him had matured since the appeal had gone against him, was about to be seized and imprisoned by the sheriff under *State* process after all *State* remedies had been exhausted, and at the time the petition was filed in the federal court was constructively or actually under restraint by his sureties. The rule for which the Attorney General contends would require peti-

tioner *to go to jail and stay there* in order to be entitled to a writ. It is respectfully submitted that this is not the law in this country.

In the article on Habeas Corpus by John Moncrieff in 29 C. J. 23, it is said:

> "So if a prisoner who has been released on bail surrenders himself of his own accord, it is held that habeas corpus will not lie, except where the custody is under state process, and exemption therefrom is claimed under the laws of the United States. In such cases petitioner may surrender himself to the State authorities, and seek relief by habeas corpus in the federal courts."

This distinction is recognized in *Baker* v. *Grice* (1898), 169 U. S. 284, 18 S. Ct. 323, 327, where this Court said:

> "If this application had been made subsequent to a trial of the petitioner in the state court, and his conviction upon such trial, under a holding by that court that the law (under which petitioner was convicted) was constitutional, and where an appeal from such judgment of conviction merely imposing a fine could not be had, except upon the condition of the defendant's imprisonment until the hearing and decision of the appeal, a different question would be presented, and one which is not decided in this case, and upon which we do not now express an opinion."

This Court, in the above quotation, describes exactly the situation of the petitioner, for he had no choice in the State tribunals but *to go to jail and stay there*, if the peculiar legal theory of the Attorney General were sound.

In *Ex parte Beach*, 259 Fed. 956, 958, the court clearly noted this important distinction. Referring to certain cases from the California courts, it said:

> "Those decisions hold, without exception, that where one is at large upon bail given in some criminal proceeding in a given jurisdiction or sovereignty, he will not be permitted voluntarily to surrender himself into

> custody, and thereby assert he is being deprived of his liberty, merely for the purpose of securing a writ of habeas corpus *from a tribunal of the same jurisdiction or sovereignty,* and thereby perhaps hasten his release from prosecution or further attack *by such jurisdiction.* The case at bar is essentially dissimilar." (Emphasis supplied.)

The District Court, the Circuit Court of Appeals and the Attorney General have completely overlooked this important distinction. They rely on *McNally* v. *Hill* (1934), 293 U. S. 131, 55 S. Ct. 24. *That case is not even remotely in point.* There the prisoner was in the penitentiary serving a sentence under a conviction he did *not attack*, and he had not begun and would not for some time begin to serve the sentence (which was to begin when the first term was finished) as to which he sought a writ. The District Court quotes a sentence from the opinion, which was clearly appropriate in view of the facts before the court, but which has no application to the facts in the case at bar. In the case of *McNally* v. *Hill* this Court rested its decision on the old rule of that court, namely, that

> "The lower federal courts have generally denied petitions for the writ where the prisoner was at the time serving a part of his sentence not assailed as invalid."

(293 U. S. 139). Obviously, the facts in the case at bar do not resemble the situation then before this Court. It is submitted with the utmost respect to the lower courts, that this clear misapplication of the rules of the prior decisions of this Court in the case at bar is most persuasive proof that this petitioner's case was not examined with that clear and correct grasp of governing principles to which a man is entitled when his liberty is in the balance. In the Hill case, the writ was sought for the

> "determination of questions which could not affect the lawfulness of the custody."

(293 U. S. 129). It must be obvious that such a situation bears not the remotest resemblance to the facts in the case at bar, where the petitioner literally stood at the gates of the county jail with all State remedies exhausted, when he petitioned the District Court.

The case of *Johnson* v. *Hoy*, 227 U. S. 245, cited on page 5 of the brief in opposition to the writ, is of the same type as the cases described in *Ex Parte Beach*, 259 Fed. 956, 958. Hoy surrendered himself in order to seek a writ "from a tribunal of the same jurisdiction or sovereignty." This is also true of the case of *Stallings* v. *Splain*, 253 U. S. 339, cited on the same page, and in addition, Stallings *had voluntarily agreed to go to Wyoming* and there was, therefore, no question in the case concerning the propriety of his detention or of the right to removal. The case is strangely out of tune with the theme song of the Attorney General. Somebody's ear for legal music is tone deaf.

II.

Under this division, opposing counsel says:

> "Petitioner has not exhausted more appropriate means than habeas corpus for the vindication of his alleged rights,"

and then proceeds to point out an error of petitioner's former counsel, misconstruing, as apparently many other attorneys had done before them, as to when the *three months' time* begins to run on applications *for certiorari* to the State Supreme Court. He does not point out what "more appropriate means" petitioner failed to exhaust. The petitioner is entitled to his fair day in court, if as we think is the case, a federal constitutional question has been involved and has not been adjudicated by a federal court. This is undoubtedly his fundamental right as a citizen under our form of government. It is no small

matter for an individual citizen to be required to combat his case through even one or two courts in bearing all the incidental expenses of attorney fees and court costs, but when this record is viewed, petitioner has been through nigh a half dozen courts, all in good faith and with sincere efforts to obtain a final decision on the merits by the highest court in the land.

The Attorney General himself feels impelled "to confess" in effect that to force upon this petitioner the costly course of legal circuity, for which the lower court seems to contend, would be little less than legal infamy. He says:

> "In fairness to the petitioner and to this court, we are *compelled* to *confess* that, since the Supreme Court of Illinois has passed *directly* and *adversely* to petitioner upon the only substantive contention that he makes here, namely, his contention that his communications to the grand jurors were an exercise of his *constitutional right of free speech* and hence could not have been contemptuous, it should be *fairly presumed that further recourse to the Illinois courts would be unavailing.*"

With that *confession* in this record from the highest legal counsel for the State of Illinois, *now* the sole counsel representing the respondent in this Court, what need for us to argue more, since we are bound to assume that this matter is to be regarded as a serious judicial proceeding and not a legal farce, or worse?

The Attorney General makes the peculiar argument that, inasmuch as the petition for certiorari was technically late, due to misinstruction of his counsel as to time, he has not exhausted his remedies before asking for *habeas corpus*, within the rules laid down by this Court. The record does not suggest sham or anything but good faith on the part of petitioner. This Court has never held that it will search the certiorari proceeding in each case to determine whether there might have been some technical or pro-

cedural falaw in it on which a refusal of the writ *might* have been based. The mere fact that the order refusing the writ states the fact that the petition came too late does not change this rule. The fact is that petitioner applied for the writ and was refused. Since the Attorney General attempts to make a serious issue of this proposition, we feel obligated to consider the subject in some detail.

1. *All State Remedies Actually Have Been Exhausted.* Here a clear grasp of the *facts* is of the greatest importance. This petitioner maintained in the State courts that the conduct which constituted the basis of the charge against him for contempt was within the constitutional guaranties of free speech and a free press found in the Federal Constitution.

On appeal to the Supreme Court of Illinois in *People* v. *Doss*, 382 Ill. 407, at page 315, that court said:

> "The constitutional guaranties invoked by defendant were never intended to and do not sanction such conduct as exhibited by defendant. These rights are not absoulte. Neither liberty of the press nor freedom of speech have yet become license."

It is, thus, clear beyond a doubt that *all the Illinois courts* considered the vital federal questions raised in this Court and in the District Court below, and deliberately passed on them adversely to this petitioner. If petitioner were to file a petition for *habeas corpus* in the Circuit Court of Piatt County on the grounds on which his petition in the court below was based, that court would deny it and point out that these grounds have all been considered by that court; and on appeal to the Supreme Court of Illinois in such a *habeas corpus* proceedings, that court would affirm in a *per curiam* and undoubtedly say:

> "The same legal questions and the same facts were before this Court in *People* v. *Doss*, 382 Ill. 307, and the decision in that case is controlling on all points

raised or which might have been raised, before this Court on appeal."

The Supreme Court of the United States denied a petition for certiorari. *Doss* v. *People*, 320 U. S. 813, 64 S. Ct. 38. Every conceivable remedy has been exhausted and all State courts has passed on the very questions which would be presented, were this petitioner sent back to the State courts.

2. The facts here and in *Ex parte Hawk*, 321 U. S. 114, are fundamentally different, and to send this petitioner back to the State court to lay a foundation for a return to the bar of the federal courts by *habeas corpus* proceedings in the State tribunals is not only not required by the rule of the *Hawk* case, but would be to send him on a journey of legal futility unprecedented except in the movie theatres, where occasionally mock court room scenes are flashed on the screen, scenes which truly mock justice and are intended to be caricatures of every civilized mode of judicial administration.

(a) It is an old maxim that the law does not require idle facts. For petitioner to go to the State court in *habeas corpus* proceedings would distinctly be "idle acts" of the most absurd and inexcusable kind. The maxim has been crystallized into legal doctrines in almost innumerable situations. I call attention to one very common illustration in this field. When a stockholder brings a representative suit in behalf of the corporation, he must normally show as a prerequisite a demand on and a refusal by the officers of the corporation to bring the suit; but if such a demand would be useless, for any one of a number of reasons, such as control of the officers by the wrongdoer himself, no such demand is needed, and a showing of such fact dispenses with the necessity for such a foundation. In excusing a prior demand on the directors because it

would have been useless, the court in *Delaware & H. Co* v. *Albany*, etc., 213 U. S. 435, 29 S. Ct. 540, said:

> "In other words, the complainants were in such a situation by reason of the power which Harrington possessed over those who managed the corporation * * * that appeals to them for action would have been futile."

It is too plain to require further elaboration that in the case at bar an appeal in *habeas corpus* proceedings to the State courts of Illinois would have been a completely futile act, because—to paraphrase the language of the United States Supreme Court in the preceding case—of "the power of precedent over the judges, it would have been useless." I could extend this brief into hundreds of pages with illustrations from the decided cases where the courts do not demand idle, useless or fatuous acts as a foundation for legal proceedings. True, this reasonable rule perhaps finds most frequent application in civil actions, but its rationale makes the doctrine just as sensible in a proceeding like that now before the court.

Let us now look at the *Hawk case*, on which the Circuit Court of Appeals, as well as the district court, chiefly rely, on the point that remedies by *habeas corpus* in the State courts not having been exhausted by this petitioner, therefore the federal courts cannot take jurisdiction in *habeas corpus* because so doing would constitute an improper or unlawful interference with "the actions of state officials. * * * Hence I see no necessity for further comment," said the District Judge, who then cited the *Hawk case*.

Respectfully, it is insisted that there *is need* for further comment, if justice is to be done in this case and in similar cases.

The Hawk case is not controlling because its facts are essentially different from the facts here; but in the state-

ment of the general doctrine it is controlling in favor of this petitioner, in this, that while it requires, as a prerequisite, that the petitioner exhaust "all state remedies available," it does not hold that this rule cannot be complied with without resort to habeas corpus in the State Courts. Put differently, the meaning of the rule is that every appropriate State remedy which, in the circumstances of each case, suggests the possibility that the State courts *may* grant relief, must be invoked before coming to the federal courts; it does not, on the other hand, mean that every conceivable procedural remedy, always including *habeas corpus*, must be resorted to by the petitioner *after* all the available State tribunals have refused him relief in *some* suitable and proper State proceeding, upon the very facts which in a *habeas corpus* or any other proceeding would be before such courts. Why stop with *habeas corpus?* Why not require the aggrieved convict to resort to *coram nobis?* Or *coram vobis?* Or some or all of numerous motions increasingly available in various jurisdictions to test the correctness of legal procedure? Is it not plain that if the test is some formal procedure rather than the actual result in substance, our whole system of justice becomes absurd?

In the *Hawk case* the Court said that the

> "petitioner's present contentions have been presented to the state courts only in an application for *habeas corpus* filed in the Nebraska Supreme Court, which it denied without opinion. From other opinions of that court it appears that it does not usually entertain original petitions for *habeas corpus*, but remits the petitioner to an application to the appropriate district court of the State, from whose decision an appeal lies to the State Supreme Court."

(P. 116.) The Court continues in the *Hawk case:*

> "Of this remedy in the State Court petitioner has not availed himself. Moreover, Nebraska recognizes

and employes the common law writ of *coram nobis* which, in circumstances in which *habeas corpus* will not lie, may be issued by the trial court as a remedy for infringement of the constitional right of the defendant in the course of the trial."

(P. 116)

In *Mooney* v. *Holohan*, 294 U. S. 103, 55 S. Ct. 340, the court reiterated the doctrine thus, without any requirement that *habeas corpus* must in all cases be resorted to as a preliminary:

> "Orderly procedure, governed by principles we have repeatedly announced, requires that before this Court is asked to issue a writ of *habeas corpus* * * * recourse should be had to whatever judicial remedy offered by the State may still remain open."

This is exactly what was done here. We exhausted all State remedies and then came to the District Court and thence to this Court. And it does

> "appear that the question presented here has been considered on the merits by the Supreme Court (of Illinois) in a prior proceeding."

Ex Parte Williams, 317 U. S. 604, 63 S. Ct. 431. This is conceded by the Attorney General, as indeed he unavoidably must do. That "state remedies" be exhausted is said to be a prerequisite in *House* v. *Mayo*, ... U. S. ....., 65 S. Ct. 517 (February 1945),.but it is *not* said that such remedies can be "exhausted" *only* by resort to *habeas corpus* proceedings.

III.

Under division III, opposing counsel says,

> "There is no merit in petitioner's substantive contention that his acts were an exercise of his constitutional right of free speech,"

and then recites, (1) that the matter is not properly before the Court because petitioner, "not being in custody, was

not subject to production on *habeas corpus,*" and (2) "because he failed to exhaust ordinary before pursuing extraordinary remedies," and then states what he conceives to be the history of the origin of grand juries and petit juries, which we cannot conceive of throwing any light upon the issue at bar. He says on page 12,

> "* * * in the state courts, at least, the Federal constitution, which does not guarantee either indictment or trial by jury at all in state courts, imposes no inhibitions upon the reasonable development and evolutionary modification of juridical concepts implicit in either trial of presentment by jury, petit or grand. Illinois was committed long before the *Doss case* to the view, modern and progressive, which inhibits grand juries, as well as petit juries, from availing themselves of common gossip as either incitement to act or evidence upon which to act."

This, obviously, has no bearing on the fundamental question whether there was any such danger, "public, actual or impending," as would justify a restraint on the fundamental right of free expression, for

> "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."

United States v. *Carolene Products Co.*, 304 U. S. 144, 152-3. In the case from which we quote above and in the case of *Bridges* v. *State of California*, 314 U. S. 252, we find the underlying philosophy the same as stated below:

> "If the history of civilization has any lesson to teach it is this: there is one supreme condition of mental and moral progress which it is completely within the power of man himself to secure, and that is perfect liberty of thought and discussion. The establishment of this liberty may be considered the most valuable achievement of modern civilization, and as a condition of social progress it should be deemed fundamental. The considerations of permanent utility

> on which it rests must outweigh any calculation of present advantage which from time to time might be thought to demand its violation."

Bury, History of the Freedom of Thought (1913), pp. 239, 240, and passim.

Then opposing counsel cites the case of *People* -v. *Parker*,* 374 Ill. 524, which has nothing to do with any question in the case at bar, except in so far as it shows conclusively that this petitioner has been the victim of harsh and arbitrary treatment and subjected to unreasonably and unconscionably severe penalties. In this case the court said:

> "There is no authority in this state as to when a communication to a grand jury is a contempt of court."

The court also said:

> "We laid down as the test when a publication concerning a grand jury was a contempt of court whether the articles had a tendency to directly impede, embarass or obstruct the grand jury in the discharge of any of its duties remaining to be discharged after the publications were made."

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*Let us examine the facts in the *Parker case*. On page 525 the court said:

> "Harrison Parker was adjudged guilty of criminal contempt in the criminal court of Cook County and sentenced to imprisonment in jail for a period of ten days."

The court continued:

> "The information charged Parker with writing two letters to the members of the Cook county grand jury, which was then in session. The letters are set forth in the information."

Parker's answer admitted the writting and sending of the letters and denied they constituted contempt. The court continued:

> "The letters are quite lengthy and are couched in exceedingly vicious and inflammatory language. They state in substance, that The Chicago Tribune, a newspaper, Robert R. McCormick, its President, Thomas J. Courtney, State's attorney of Cook county, John S. Clark, the Cook county assessor, and a firm of attorneys which represented The Chicago Tribune, had entered into a criminal conspiracy to defraud the State of Illinois by the illegal omission from the Cook County tax rolls of personal property of The Chicago Tribune. In the first letter Parker charged The Chicago Tribune had already 'stolen' from the State approximately forty-three million dollars. In the second letter the amount was stated to be one hundred million dollars. The letters also charged the above parties, or some of them, with perjury, subornation of perjury, bribery, malfeasance in office,

In this case we find illustrated what the Circuit Court of Cook County, Illinois, considered a fair and reasonable punishment for indirect contempt through communicating with the grand jury. In that case the communications of the defendant Parker were extremely violent and vicious. We have inserted some specimens from the Liberty Press in the Appendix. Nothing said by the petitioner in the Liberty Press is comparable from the standpoint of vituperative violence to the statements Parker made. We copy from the opinion in the margin. Yet, while the court gave petitioner the outrageous sentence of three months in jail and a fine of $2,000, Parker received ten days in jail! Judgments in these cases are discretionary, but when there is such a gap as we see here, it is obvious that the judgment of the court in the case of petitioner was arbitrary and unreasonable and the punishment cruel and unusual, in violation of Amendment VIII of the United States Constitution, were that provision applicable to the states. It must be obvious that petitioner has not been given the benefit of the quality of mercy a great poet said "droppeth

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and specifically charged The Chicago Tribune with 'influencing, intimidating or bribing the courts to prevent a trial on the law and the facts' and with 'giving orders' to the courts. One of the letters states that McCormick, 'under whose directions this enormous steal has been effected, is a coward, a liar, a cheat, a thief, a courtfixer and all-around scoundrel who, after he has cunningly robbed the State that shelters and protects him, will pollute the Channels of Justice to hide his thefts.' Parker also charged McCormick with having 'railroaded' two innocent men to prison and with having cheated the State out of every penny of inheritance tax due from the estate of his mother. He stated that Courtney (the State's attorney) had refused to prosecute the crimes because of his own complicity in them. He also compared Courtney with a State's attorney in Los Angeles, California, who 'was playing fast and loose with the organized thieves of Los Angeles' and who was indicted by an alert and law-respecting grand jury, tried and convicted. He also referred to the corruption which had been prosecuted in New York, Connecticut, Kansas City and Louisiana. Parker stated three attempts had been made to murder him, but neither the allurements of fortune nor the terrors of death could deter him from doing his duty. He offered to appear before the grand jury and present legal proofs of the charges with reference to the conspiracy, which is mildly described above,' to rob the homeowners of Cook County. He also warned the Grand jury that great pressure would be brought to bear upon it to ignore his letters."

like the gentle dew from heaven upon this place beneath" —possibly Piatt County has at times been beyond the jurisdiction of the gentle rain-Maker.

The notion that anything in the Liberty Press interfered with the administration of justice in Piatt County is somewhat farfetched. For the present Attorney General of Illinois solemnly to urge upon this high Court that justice was put in jeopardy by matters set forth in the Liberty Press by this petitioner is a little startling, for the courts of Illinois contain a report of a case very recently decided, where justice was actually interfered with and a change of venue ordered, because the Attorney General, now sole counsel for the State of Illinois in this matter, and others had made public statements about a criminal case pending before the grand jury, which the court deemed of such a prejudicial inflammatory and improper character as to necessitate a transfer of the proceeding to another county (Piatt). We refer to the case of *People* v. *Ziller* in McLean County. We do not recall any worry about contempt in that case. Two wrongs, we know, do not make a right, but justice should be administered with impartiality and its precepts respected by those who ask respect for them.

IV.

It must not be overlooked, although both the State and the lower federal courts seem to have done so, in this case, that the real conflict here is between *individuals*, namely, *this petitioner*, and a public official of Piatt County, Illinois (only incidentally some other persons). This official invoked the aid of penal statutes in his controversy with this petitioner and while State's attorney caused grand jury to be convened to investigate the conduct of petitioner to determine whether he should be indicted for criminal libel under a State statute. While these matters were in

progress, the petitioner published the material (and circulated it) which formed the basis of the contempt charge. During all this time the State's attorney and others had the full protection of the civil libel laws of the State, but they did not invoke them. So while here the *formal* "conflict is between authority and the rights of the individual" (*West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 630), the real struggle is between natural persons, one of whom invokes a State law to restrict the right of the individual (petitioner) to free speech.

The Fourteenth Amendment, through the due process clause, transmits the principles of the First Amendment to this case. These principles are definite.

> "They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect * * *. They may not be restricted in order to protect private rights *susceptible to redress by other means.*" (Emphasis supplied.) *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639, 641.

On page 23 (Appendix) counsel set forth statements from the Illinois Supreme Court which glaringly illustrate how grossly that tribunal is out of step with this Court on the important subject of a free press. It is there said that it matters not when newspaper articles appeared, the publisher is equally subject to condemnation. This is not the law as laid down by this Court. *In re W. A. Doss*, 367 Ill. 570 (1937), we have another illustration of the failure of that court to grasp the fundamental rights of individuals under the First and Fourteenth Amendments. The court there said:

> "The publication of newspaper articles, regardless of when they appeared * * * (is) especially to be condemned. (P. 573.) * * * The fifth complaint charged respondent with the preparation and the

> publication of numerous newspaper articles which, although appearing after the trial of the cases involved, criticised the court and prosecuting officers in intemperate language."

Contrast this with what this Court said in *Bridges* v. *State of California*, 314 U. S. 252 (1941), where, among other things, it said:

> "Such criticism after final disposition of the proceedings would clearly have been privileged (P. 272.) * * * The assumption that respect for the judiciary can be won by shielding judges from public criticism wrongly appraises the character of American public opinion."

(P. 270.) This great Court did not take refuge behind platitudinous generalities, such as suggesting that the petitioner is "responsible" for his acts; it clearly and ably expounds the doctrine that there must be "clear and present danger" to some public right or interest which is paramount to the right of the individual to free expression. The state courts and the lower federal court alike have either overlooked or refused to take the trouble to consider this gravely important subject.

Even where the judgment of the Supreme Court is attacked in a case pending before it, rules against publishers for contempt would be discharged where the publications do not create a clear and present danger of substantive evils. *Graham* v. *Jones* (1942), 200 La. 137, 7 So. (2d) 688.

In *Edward G. Budd Mfg. Co.* v. *National Labor Rel. Board* (1942), 142 Fed. (2d) 922, 928, the Circuit Court of Appeals, 3rd Circuit, said:

> "A contempt proceeding may serve in appropriate circumstances as the efficient means for vindicating a court's judgments or decrees, but 'it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality.' See

Milk Wagon Drivers Union v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 293, 61 S. Ct. 552, 555, 85 L. Ed. 836, 132 A. L. R. 1200 (concerned with rights under the Fourteenth Amendment)."

Both the Attorney General and the lower State and federal courts miss completely the point made by petitioner, namely, that the jury obviously was not influenced by the matters it is said petitioner sent the members, because he was indicted. The reason for calling attention to this fact is that it shows that there never was any "clear and present danger of evil" or "grave and immediate danger" from the conduct of petitioner which the court held contemptuous. This is so obvious that no further elaboration of the point will be made. This Court has held many times that "clear and present danger of evil" is the test, not the *intent* which some one may spell out of conduct. The Illinois court accepts the latter. *People* v. *Doss*, 282 Ill. 307; brief in opposition, 18, ff.

In a concurring opinion in the case of *Whitney* v. *California*, 274 U. S. 357, 376, Justice Brandeis said:

> "Fear of serious injury cannot justify suppression of free speech * * * there must be reasonable ground to believe that the danger apprehended is imminent * * * that the evil to be prevented is a serious one. * * * But even advocacy of violation (of law), however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement. * * * In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated. * * * Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as a means of averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as a means of protection, is unduly harsh or oppressive. * * * There must be the probability of serious injury to the state."

This is the law in this Court; it is not the law in the jurisdiction of Illinois, where these fair standards, alike for the protection of the individual and of society, are not even mentioned in the cases. It is respectfully urged that, measured by these standards, the interpretation of the law by the lower State and federal courts violates the constitutional rights of this petitioner.

V.

What the rule at common law may have been on the subject of communicating with grand jurors is not decisive, not even important, in relation to any point on the subject of a free press, which also includes the right to circulate pamphlets, papers and the like. Said Justice Sutherland in speaking for a unanimous report in *Grosjean* v. *American Press Co.* (1936), 297 U. S. 233, 249:

> "In the light of all that has now been said, it is evident that the restricted rules of the English law in respect of the freedom of the press in force when the Constitution was adopted were never accepted by the American colonists, and that by the First Amendment it was meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting any form of previous restraint upon printed publications, or their circulation. * * *"

The "previous restraint" here is the so-called criminal libel statute, as construed by the lower State and federal courts, and the old rules of the common law on the subject of communications with grand jurors.

Conclusion.

This petitioner, as an individual, is, of course, relatively unimportant. And yet we recently have been told by an able and clear-thinking man:

> "The second postulate of democracy, equally funda-

> mental, is that the individual is of infinite worth—so towering in the scale of values that he has rights even against the state."

Challenge to Freedom, by H. M. Wriston, 1943, p. 12. It happens, however, as petitioner firmly believes and therefore most solemnly avers, that his situation and the case he presents embody certain eternal verities of which the clauses in the Federal Constitution for the protection of free expression are but the verbal symbols. He speaks for the spirit of liberty which, in view of the argument of the Attorney General and the decisions of the Illinois and lower federal courts on the subject, is in grave peril in the jurisdiction of Illinois, unless this Court draws around it "the awful circle" of the Constitution, over the arc of which no tyrant, no despoiler of freedom, has heretofore dared to tread. Dred Scott was a black man, unimportant and unknown, yet he and his case were instruments in a critical era of our national existence which profoundly affected the course of our history. This case, your Honors, means much to this petitioner, but he believes it means infinitely more as a white stone along the pathway which liberty has moved in its stately march forward for the betterment of the lot of the ordinary man. Inspired by these convictions, your petitioner has carried on this fight and now respectfully suggests that a writ of certiorari should be granted.

Respectfully submitted,

William A. Doss,
Petitioner, Pro Se.

Richard E. Westbrooks,
Attorney for Petitioner,
3000 South State Street,
Chicago, Illinois.

VI. APPENDIX.

EXTRACTS FROM LIBERTY PRESS.

Liberty Press, November 8, 1941:

"I understand Glasgow solemnly advises his grand jury that they can hear no witnesses on anything unless the actions all occurred in the last 18 months—or in a few cases he stretches it to 3 years. Well, if he does so advise, he is not correct—because there are several conditions that might exist about a criminal case that would allow evidence to be proper before a grand jury even if the evidence was over three years old—for instance in murder cases—there is no statute of limitations—so long as the actual murderers have not all been prosecuted!"

Page 40:

"Is this a country where there is justice and freedom for all alike? I'm not asking the grand jury to not investigate about me—I'm offering to help them do all that—but what I am charging that grand jury, is with notice of my willingness to appear as a witness so why stop your investigations at my door? Is Shonkwiler's house, or Glasgow's house, more privileged? Will Glasgow or Shonkwiler submit to be a witness before the grand jury on the same terms that I have agreed to do myself? I'll wager neither of them will—and they'll not let Dwight Doss be appointed special prosecutor to examine them! That really might ball things up!"

As to Liberty Press Issue No. 2, Sixth Division, dated December 23, 1941, pp. 2 and 3:

"Yesterday morning, a few minutes after 9:00 o'clock at my office, I was called to the telephone by the said Attorney Oliver D. Mann saying that he was at the office of States Attorney Glasgow and that the Grand Jury was in session and that he had understood that I

was willing to appear before the Grand Jury and that the Grand Jury was willing for me to appear and that I would sign a waiver of all rights to any exemptions from any prosecutions that might come against me in claiming a defense because I had appeared, to which I replied that, that was correct, and he asked me to come to States Attorney Glasgow's office and sign the waiver, to which I replied, 'No, I will not come to that man's office, but I will go to the Circuit Clerk's office and be sworn there', to which Mr. Mann kindly assented, and I went over and signed the waiver, swore to it before John Bickel, Circuit Clerk, and gave it to him, and a copy thereof is as follows:

" 'STATE OF ILLINOIS, }
" 'COUNTY OF PIATT. } ss.

" 'I, William A. Doss, in consideration of being permitted to testify before the Piatt County Grand Jury on December 22, 1941, on my own motion, do hereby by these presents waive my constitutional and statutory rights of immunity from prosecution on indictments which may be returned against me by the said Grand Jury for the County of Piatt, State of Illinois, and waive any and all rights that I might have by law or otherwise to claim immunity from prosecution of testifying to matters and things upon which said indictment or indictments may be returned.'

(Signed) 'WILLIAM A. DOSS.'

" 'STATE OF ILLINOIS, }
" 'COUNTY OF PIATT. } ss.

" 'On this 22nd day of December, A. D. 1941, personally appeared before me, an officer authorized to administer oaths, William A. Doss, who acknowledged that he signed the above waiver of immunity for the uses and purposes therein set forth as his own act and deed.''

(Signed) 'JOHN W. BICKEL,
(COURT SEAL) *'Clerk of Circuit Court.'* "

"With this formality thus completed the special prosecuting attorney, Mr. Mann, and I were ready to march to, as we did, the Grand Jury room, etc. * * *"

Also, on page 3 of said Issue, we include in the statement the following:

"On one occasion while I was reading the late decision of the United States Supreme Court (while before the grand jury) on the very question of what rights are vested in citizens by the Bill of Rights, to the freedom of speech and freedom of publication, and which decision Mr. Mann admitted that he did not know anything about, and of course, he could not advise a Grand Jury on the subject of law that he himself had admittedly not read, although I took notice that he felt he could do so with total disregard to that high decision, but he thought nothing of that, as lawyers usually are more or less blind to the merits of an opposing side. They become uprighteously more or less prejudiced to their own contest, so I viewed him that way."

Also on pages 4 and 5, we further quote:

"I think the Court of Public Opinion of the people of Piatt County is entitled to know, as well as the present grand jurors and therefore I deem it proper and of no offense to anyone, and no violation of the law, to publish the provisions of the Constitution and of the Statutes of Illinois, on what is called *Libelous* matters.

"The Constitution of Illinois on that subject is as follows (here follows Article II, Sec. 4, of the Constitution of 1870, and the Statute of Illinois, on that subject):

" 'Sec. 4. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be sufficient defense."

"'Illinois Criminal Code—1941 Illinois Revised State Bar Statute, Chapter 38:

"'Sec. 402—Defined: A Libel is a malicious defamation, expressed either by printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation or publish the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, ridicule, or financial injury.

"'Sec. 402—Punishment: Every person, whether writer, or publisher, convicted of libel, shall be fined not exceeding $500.00, or confined in the county jail not exceeding one year.

"'Sec. 404—Justification: In all prosecutions for libel, the truth, when published with good motives, and for justifiable ends, shall be a sufficient defense'."

The last foregoing quotations on pages 4 and 5 of said issue immediately precedes that part of the amended information quoted from the Liberty Press, which begins with these words, "Some argument has been made, etc.," and is shown in the transcript of record, page 18.

Page 7, Issue of December 23, 1941:

"Attorney Mann made another statement to me that I then and now take rank exception to, as he was spreading before the grand jury his opinion to the effect that Judge Doss had no right to publish such things as he has done in the Liberty Press, hurting the reputations of such good young lawyers and States Attorney, as Carl I. Glasgow, etc., and I called his hand courteously, but courageously, and told him that *he did not know the facts.* I asked him to consider this situation: that only this spring Carl Glasgow deliberately called Dwight Doss, a young lawyer, my son, into his office about the matter of Dwight filing a motion for a new trial in a bastardy case, and, in substance, threatened Dwight with this situation, viz., that if Dwight filed a motion for a new trial that he, Glasgow, would have the grand jury indict the boy's father for

attempting to buy witnesses to testify falsely; and Dwight replied in substance, 'Mr. Glasgow, you should go ahead and get the indictment if the father is guilty. That is your duty to do.' But Dwight filed his motion for new trial, as I had told him (Dwight) not to worry, he could safely file his motion for new trial, that Glasgow was simply a liar and a bluffer, and that there would be no indictment, because I did not think the father was guilty, and I did not think Glasgow had any evidence that would even tend to prove his guilt. So I said to Mr. Mann, 'You do not know the facts, but the Liberty Press has published the truth, and I take exceptions to your statements.'

"I take this opportunity to call the attention of the people of Piatt County to the fact, which is too often overlooked and under-appraised, that it is exceedingly important that you have not only in your County Judge office, but in your States Attorney office as well, only an attorney who can and will keep himself free from being used as a tool of other men to accomplish things which too often are unrighteous, to not use a more uncharitable word. It is no new charge for me to say that States Attorney Glasgow is the stool pigeon of Robert P. Shonkwiler especially, and, of course, he works in harmony with Attorneys N. E. Hutson and E. J. Hawbaker, but seldom in half-way fairness to Judge Doss, or to his son, Dwight Doss, in any matters where he might feel or know that what he would do might be unpleasant or frowned upon by either Shonkwiler, Hutson, or Hawbaker."

Then follows that portion of the amended information that begins, "Now that is a situation that is terrible to exist in a little county, etc.," we believing that the foregoing is necessary for a fair and impartial understanding of the charges included in that portion of the information.

Pages 8 and 9, issue of December 8, 1941:

"In conclusion I copy the quotations I have given before on statements on the value of one's right to liberty, freedom of speech and freedom of the press,

appearing on pages 47 and 48 of Liberty issued the 20th instant, as given by some of the greatest American citizens we have, and they are as follows:

"(1) I quote from Franklin D. Roosevelt, our great President:

" 'In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms. The first is freedom of speech and expressions everywhere in the world."

"(2) I quote from Wendell L. Willkie:

" 'Americans have a genuine passion for liberty and a genuine passion for justice. Sometimes hatred obscures this instinct for fair play. It is well to remember that any man who denies justice to someone he hates prepares the way for a denial of justice to someone he loves.' "

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 934

WILLIAM A. DOSS,

Petitioner,

vs.

E. E. LINDSLEY, SHERIFF, PIATT COUNTY, ILLINOIS,

Respondent.

MOTION TO CONSOLIDATE OR CONSIDER TOGETHER PETITIONS FOR CERTIORARI IN DOCKET NO. 934 OF THE SUPREME COURT OF THE UNITED STATES; CASE NO. 8627, UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT; AND PETITION FOR CERTIORARI TO THE SUPREME COURT OF ILLINOIS IN ITS CASE NO. 28507, AN ORIGINAL HABEAS CORPUS PROCEEDING.

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Chicago, Illinois,
Attorney for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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Now comes the petitioner in the above entitled matter, Docket No. 934 in this Court, and moves that consideration of the Petition for Certiorari in Docket No. 934 be deferred by this Court until this Petitioner files his Petition for Certiorari, which he is now preparing, in the case of United States of America *ex rel.* William A. Doss, Petitioner-Appellant *vs.* E. E. Lindsley, Sheriff of Piatt County, Illinois, Respondent-Appellee, which case is dock-

eted in said Circuit Court of the Seventh Circuit under No. 8627, and in which case the said Circuit Court of Appeals affirmed the District Court and on the fourteenth day of March, 1945, denied the undersigned Petitioner's Petition for Rehearing, and also that the Petition of this Petitioner in an original *habeas corpus* proceeding in the Supreme Court of Illinois, for a writ of certiorari directed to the Supreme Court of Illinois in said case, being No. 28507, be considered by this Court at the same time and that all three matters be thus consolidated.

Respectfully submitted,

WILLIAM A. DOSS,
Petitioner, Pro Se.

RICHARD E. WESTBROOKS,
3000 South State Street,
Chicago, Illinois,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

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Respondent.

MEMORANDUM IN SUPPORT OF MOTION.

1. *Docket No. 934 in the Supreme Court of the United States.* The case now before this Court on Petition for Certiorari, No. 934, originated in Piatt County, Illinois, in the form of a judgment of the Circuit Court of that County, holding the petitioner, William A. Doss, guilty of indirect contempt in this, that it was alleged that he had communicated with members of a grand jury while in session in such a manner and from such motives as to constitute contempt of court. He appealed to the Supreme Court of Illinois from the contempt order, which court affirmed the Circuit Court of Piatt County (*People* v. *Doss,* 382 Ill. 307), and later this Court denied a petition for a writ of certiorari (*Doss* v. *People,* 320 U. S. 762). He thereupon filed a petition for *habeas corpus* in the United States District Court. That petition was denied and denial affirmed by the United States Circuit Court of Appeals for the

Seventh Circuit, and a petition for rehearing thereon was also denied (Circuit Court of Appeals, Seventh Circuit, No. 8542). Thereupon petitioner filed his petition in this Court for a writ of certiorari, which proceeding is docketed as No. 934. Briefs in Reply to Brief of Opposition to the Petition in this Court are due and will be filed on or prior to March 23, 1945.

2. *Docket No. 8627, United States Circuit Court of Appeals, Seventh Circuit.* In this case the parties are the same as in No. 934 in this Court, except that petitioner is the relator in the former. The petitioner, publisher of a paper called the Liberty Press, had made certain statements and charges concerning and against the State's Attorney of Piatt County, Illinois and other members of the bar of that county. This petitioner was indicted by a grand jury for criminal libel under a State statute on the subject, which is printed in the Appendix to this Memorandum. While this grand jury was in session, it is charged that petitioner sent copies of the Liberty Press to grand jurors with the intent to influence their deliberations. It is on this alleged factual situation that the contempt conviction, involved in No. 934 in this Court, was based.

In the case of the *United States, ex rel. W. A. Doss* v. *Lindsley*, Circuit Court Docket No. 8627, *supra*, the conviction of petitioner was affirmed in *People* v. *Doss*, 318 Ill. App. 387, and that court was affirmed in same, 384 Ill. 400. Petition for certiorari was denied by this Court, 321 U. S. 789. Petitioner thereupon applied for a writ of habeas corpus, which application was denied, and the denial was affirmed by the United States Circuit Court of Appeals for the Seventh Circuit, and a petition for a rehearing denied by that Court on March 14, 1945. Petitioner is now preparing a petition for a writ of certiorari to this Court, directed to the United States Circuit Court

of Appeals, Seventh Circuit, in this case, namely, No. 8627 in said Circuit Court. He will prepare this petition and the record in the case as expeditiously as possible and within the time required by the Rules of this Court.

3. *Case No. 28507, Original Application for Habeas Corpus in the Supreme Court of Illinois.* After the district court refused to issue a writ of *habeas corpus* in the contempt case (No. 934 in this Court) on the ground, among others which were more or less intimated, that petitioner had not exhausted his remedies in *habeas corpus* in the State courts, this petitioner, in order to preserve his rights, should the ruling of the district court be sustained, filed a petition for *habeas corpus* in the Supreme Court of Illinois, with E. E. Lindsley, Sheriff of Piatt County, Illinois, as Respondent. This petition that Court denied on January 9, 1945, and, therefore, petitioner's petition for *certiorari* and the record must be filed in this Court not later than April 9, 1945. Petitioner has most of the record prepared and printed at this time and will have all necessary documents on file on or before April 9, 1945. The same questions, substantially, will be before the Court in this proceeding as in No. 934.

It seems clear that this Court will be able to pass upon the petitions for certiorari in all these cases more expeditiously if they are considered together. Essentially, all cases grow out of the same or related fact situations in such a way that they may share a common fate. If the contention of the petitioner that the criminal libel statute, as construed by the lower courts and as applied to the statements in the Liberty Press, infringes the right of free speech and a free press in violation of the First and Fourteenth Amendments to the United States Constitution, be eventually sustained, his contention that the contempt order against him is void on the same grounds, will also

probably be upheld. While superficially the three cases present some differences, they are so closely related and present so important and similar questions of law that in the interest of the fullest presentation and the most thorough understanding of the issues, the petitions for certiorari should be considered by this Court at the same time. Similarly, should a writ issue, the cases should undoubtedly be heard together on the merits.

Respectfully submitted,

WILLIAM A. DOSS,
Petitioner, Pro Se.

RICHARD E. WESTBROOKS,
3000 South State Street,
Chicago, Illinois,
Attorney for Petitioner.

APPENDIX.

Smith-Hurd R. S., 1943, C. 38, Sec. 402. *Libel Defined.*

"A libel is a malicious defamation, expressed either by printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation or publish the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, ridicule, or financial injury."